TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 9

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING, ET AL., ETC., PETITIONERS,

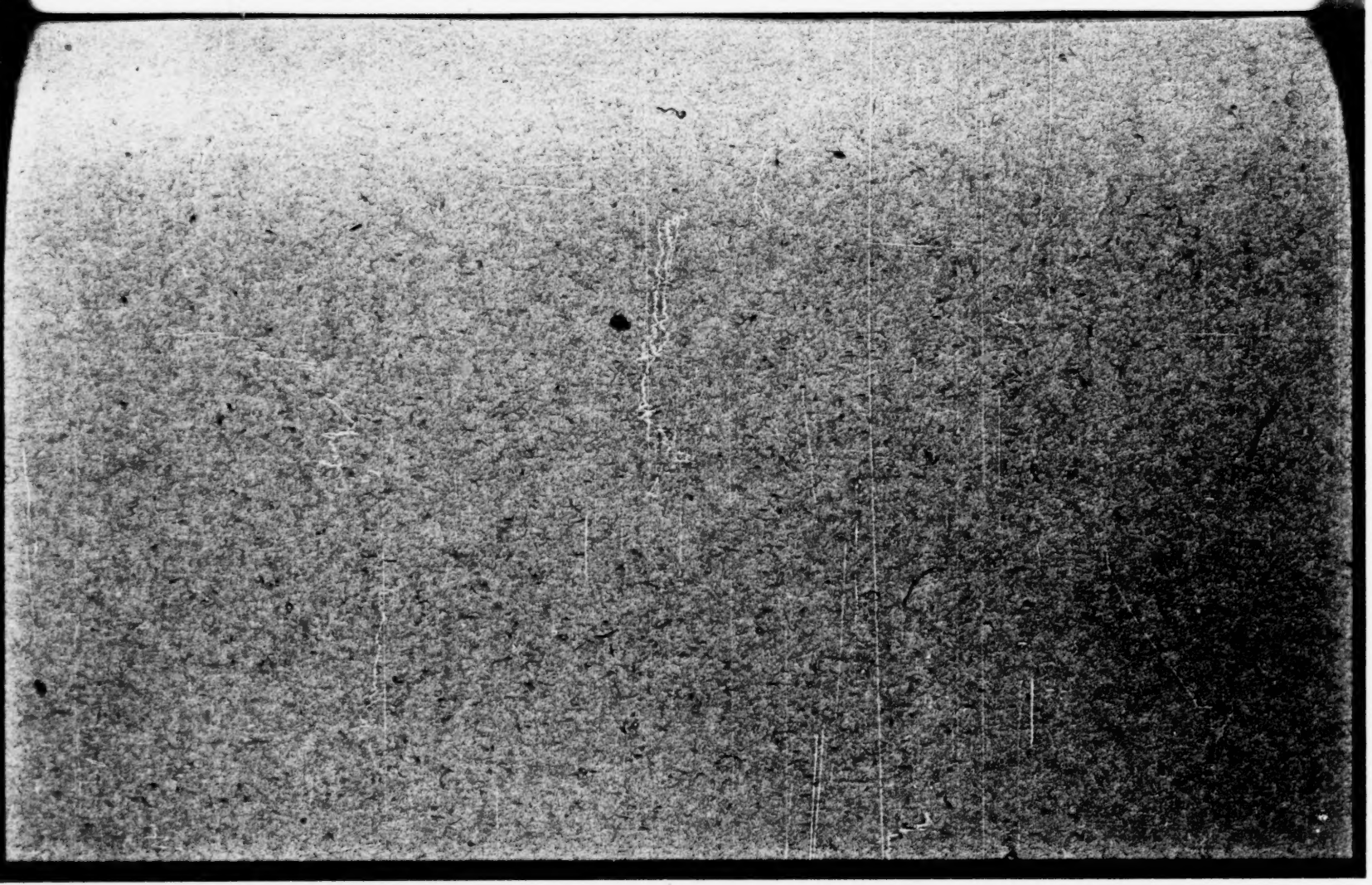
vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1934

CERTIORARI GRANTED APRIL 30, 1934



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 9

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING, ET AL., ETC., PETITIONERS,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

		Page
Proceedings in United States circuit court of appeals, tenth circuit	a	1
Caption.....(omitted in printing)..	a	
Record from district court of the United States, District of Wyoming	1	1
Caption.....(omitted in printing)..	1	
Bill in equity	1	1
Temporary restraining order	8	8
Order for temporary injunction	11	10
Answer	12	12
Judge's memorandum, filed August 30, 1932	28	27
Judge's memorandum, filed November 9, 1932	33	32
Findings of fact, conclusions of law, and decree	44	43
Statement of evidence	49	48
Caption	49	48
Plaintiff's Exhibit "A"—Order of State Board of Equalization fixing value of property for taxation	49	49

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 1, 1934

—5058-C

	Original	Print
Testimony of C. F. Balch	52	51
Table showing percentage of traffic units, use of rolling stock, etc	55	55
Plaintiff's Exhibit "G"—Statement showing assignment of property values to State of Wyoming, C. & N. W. Ry. Co	59	58
Plaintiff's Exhibit "H-2"—Statement showing amount of property of entire line and proportion in Wyoming, etc	62	61
Plaintiff's Exhibit "H-4"—Statement showing value of entire line as adopted by Wyoming board, etc	63	62
Plaintiff's Exhibit "J-1"—Statement showing value of railway operating property in Wyoming	65	64
Plaintiff's Exhibit "L"—Statement of ratios of performance units, etc., in each State to entire line, 1930	68	68
Plaintiff's Exhibit "M-6"—Freight traffic statistics, 1930	70	70
Testimony of J. A. Lorch	84	84
Plaintiff's Exhibits "U" and "U-1"—Statements showing physical characteristics of property	86	87
Plaintiff's Exhibit "U-2"—Property statement	89	90
Plaintiff's Exhibits "U-3 and "U-4"—Property statements	90	91
Plaintiff's Exhibit "U-5"—Property statement	92	94
Plaintiff's Exhibit "U-6"—Property statement	94	95
Plaintiff's Exhibit "U-7"—Property statement	94	96
Plaintiff's Exhibit "U-8"—Property statement	95	97
Plaintiff's Exhibit "U-9"—Property statement	97	98
Testimony of William F. Carroll	99	101
Testimony of R. A. Miller	99	101
Defendants' Exhibit 1 (sheet 13)—Tax return, 1930	100	102
Testimony of C. H. McWhinnie	105	107
Defendants' Exhibit 8—Valuation statement	117	118
Testimony of F. Chatterton	122	125
Testimony of C. F. Balch (recalled)	123	126
Plaintiff's Exhibit "W"—Memorandum setting up an analysis of testimony of C. H. McWhinnie	123	126
Order approving statement of evidence	136	139
Petition for appeal	137	140
Assignment of errors	137	140
Order allowing appeal	143	146
Cost bond, Recital as to	143	146
Citation, Recital as to	143	146
Motion for extension of time within which to docket appeal	143	146
Order granting motion for extension of time	144	147
Notice of lodgment of statement of evidence	144	147

	Original	Print
Request for leave to substitute Charles M. Hall as a defendant in the place of and for the defendant Charles T. Cole	145	148
Order permitting defendants to substitute Charles M. Hall as a defendant	146	148
Election as to printing	146	149
Præcipe for transcript	146	149
Stipulation for transcript of record	148	150
Clerk's certificate (omitted in printing)	149	
Order of submission	151	152
Opinion, Bratton, J	151	152
Dissenting opinion, Symes, J	156	157
Decree	163	164
Petition for rehearing	163	165
Order denying petition for rehearing	165	166
Motion for stay of mandate	166	166
Order staying mandate	167	167
Clerk's certificate (omitted in printing)	167	
Order allowing certiorari	169	167

[fols. ½ & a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING

Civil. No. 2175

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THOMAS C. ROWLEY, as Treasurer of Converse County, State of Wyoming, et al., Defendants

BILL IN EQUITY—Filed Nov. 7, 1931

Comes now the plaintiff, and for cause of action against the defendants, and each of them, says:

1. Plaintiff is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws, and a citizen, of the State of Illinois.

2. Defendant Thomas C. Rowley is, and throughout the [fol. 2] year of 1931 was, the duly elected, qualified and acting treasurer of the County of Converse, in the State of Wyoming, and is a bona fide resident and citizen of said Converse County, State of Wyoming.

3. Defendant Charles T. Cole is, and throughout the year of 1931 was, the duly elected, qualified and acting treasurer of the County of Fremont, in the State of Wyoming, and is a bona fide resident and citizen of said Fremont County, State of Wyoming.

4. Defendant Alta Pearl Massee, is, and throughout the year of 1931 was, the duly elected, qualified and acting treasurer of the County of Natrona, in the State of Wyoming, and is a bona fide resident and citizen of said Natrona County, State of Wyoming.

5. Defendant D. A. Shoopman is the duly appointed, qualified and acting treasurer of the County of Niobrara, in

the State of Wyoming and is a bona fide resident and citizen of said Niobrara County, State of Wyoming.

6. The amount involved in this suit, exclusive of costs and interest, exceeds the sum of Three Thousand Dollars ($3,000.00) as to each of the defendants herein named, and this suit is a controversy wholly between the citizens of different states.

7. This suit involves the construction of the Fourteenth Amendment to the Constitution of the United States, in which it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor shall any state deny to any person within its jurisdiction the equal protection of the law, and of Section 8 of Article 1 of said Constitution empowering Congress to regulate commerce among the several states; and this plaintiff claims the protection of the provisions of the said Constitution against the unlawful acts of the defendants as hereinafter set forth.

8. This suit is a suit in equity to enjoin the collection by defendants from the plaintiff of illegal taxes, such illegality arising out of the fact that, while the property of plaintiff is valued and assessed in the State of Wyoming at a figure greatly in excess of its actual value, all other property in [fol. 3] the state is valued and assessed at not more than 60% of its actual value, and there results therefrom an unlawful discrimination against the plaintiff.

9. Prior to the first Monday in June, 1931, plaintiff made out its return, containing a sworn statement and schedule of all its property, containing all the data and information required to be therein contained by the provisions of Chapter 57, of the Session Laws of the State of Wyoming for the year 1923, and filed the same in the office of the Wyoming State Board of Equalization.

10. Thereafter, the said Board of Equalization found the value of plaintiffs' property in the State of Wyoming to be $7,989,587.00, and thereupon, and before certifying the valuation and assessment so made by it to the county assessors of the several counties in which plaintiff's property is located, duly notified the plaintiff of the aforesaid

valuation and assessment made by it, and fixed the 9th day of July, 1931, as the day upon which the plaintiff might appear before said board and present its objections to such valuation and assessment, and for hearing on the same.

11. On the said 9th day of July, 1931, a hearing was had before the said State Board of Equalization upon objections presented by the plaintiff, and thereafter and on the 14th day of July, 1931, the said State Board of Equalization, by resolution fixed the valuation of the property of the plaintiff in the State of Wyoming, at the sum of $7,881,003.94, which said sum is $2,031,433.94, in excess of the actual value of said property. And plaintiff says that, although it has each year during the past five years, protested such action on the part of said State Board of Equalization, the said board has each of said years valued the property of the plaintiff at a figure more than two million dollars in excess of the value of said property.

12. Plaintiff says that it owns and operates a system of railroads with lines extending into and through the States of Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota and Wyoming; that it owns and operates 278.35 miles of main track in the State of Wyoming, and 8,180.20 miles of main track in the other states mentioned; that the miles of main track belonging to the plaintiff in the State of Wyoming are less than one-half of the value per mile of its miles of main track located outside the State of Wyoming, and that while it has no [fol. 4] switching or terminal facilities or other property aside from its main track of any considerable value used in its railroad operations located in the State of Wyoming, it has, owns and operates in connection with its system in other states, elevated tracks, elevators, shops, terminal facilities, double main line tracks, ore docks, railway stations and other equipment of great value, and that the value of the plaintiff's property used in its railway operations and located outside the State of Wyoming is more than twice the value per mile of road of its said property so used and located in the State of Wyoming, all which facts as herein set out were at all times herein mentioned, and particularly on the 14th day of July, 1931, well and fully known to all the members of the Wyoming State Board of Equalization.

Plaintiff says that the said State Board of Equalization, having properly determined the entire railway system of the plaintiff, used in its railroad operations, to be of the value of $375,285,902.00, in fixing the value of that portion of its said property located within the State of Wyoming and subject to valuation by the said board, took and accepted as a factor the percentage of plaintiff's main line track located within said state of the total miles of its main line track located in and outside said state, to-wit: 3.29%, and in so doing arbitrarily and unlawfully, failed and neglected to take into account the fact, as hereinbefore set out, and well known to said board, that the value of plaintiff's property in the State of Wyoming, measured by the number of miles of main line track in said state, is less than one-half the value of its property located in states other than the State of Wyoming so measured. And plaintiff says that by the said arbitrary method, and by arbitrarily and wrongfully using the plaintiff's net operating revenue, instead of its gross operating revenue, as a factor in fixing the value of plaintiff's property in the State of Wyoming, its valuation was, by said board, arbitrarily, fraudulently and unlawfully fixed at a sum approximately two million dollars in excess of the actual value of said property.

13. Plaintiff says that for several years last past and particularly in the year 1931, the said State Board of Equalization unlawfully, arbitrarily, knowingly and intentionally valued plaintiff's property for taxation purposes in the [fol. 5] State of Wyoming at about 33⅓% in excess of the actual value thereof.

14. For more than ten years last past, it has been the common and universal practice of the county assessors of all the counties of the State of Wyoming, purposely, intentionally and systematically to place a valuation for taxation purposes upon the property generally of the taxpayers of the said state, not including this plaintiff, greatly less than the actual and proper value of said property; that in the years 1919 and 1920, such property so assessed by the said county assessors was valued at from ten to fifty per centum of the actual value thereof, and that in the year 1931, the property generally in the State of Wyoming, assessed by the county assessors of said state, and not including the property of the plaintiff, was intentionally

valued by said county assessors for taxation purposes at not exceeding sixty per centum of the actual value thereof; that for years last past, and including the year 1931, the said county assessors, with the knowledge and consent of the State Board of Equalization, have knowingly and intentionally omitted entirely from the assessment rolls certain classes of property legally taxable and not exempt under the statutes of said state, amounting in value to the sum of approximately one-fifth of the total assessed valuation of all the property of said state; that said undervaluation of property by the said county assessors, and said omission by them of property from the assessment rolls, has been made and is being made by said county assessors, systematically, notoriously, unlawfully, intentionally, and with the knowledge and approval of the State Board of Equalization, and for the purpose of unlawfully requiring and compelling the plaintiff to pay taxes greatly in excess of the amount of taxes justly and legally due from it, and that the valuation and assessment of the property of the plaintiff by the said State Board of Equalization at amounts in excess of the actual value of said property, and the systematic and intentional undervaluation by the county assessors of all the property located in the State of Wyoming subject to assessment by the said county assessors, has operated and does operate fraudulently to discriminate against the plaintiff in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

[fol. 6] Plaintiff further says that in fixing a valuation and assessment for tax purposes upon plaintiff's property in excess of the actual value thereof, and in valuing property generally throughout the State of Wyoming other than that of the plaintiff, at not more than 60% of its value, the said State Board of Equalization and the county assessors of the counties in which property of the plaintiff in the State of Wyoming is located, acted arbitrarily, and with the fraudulent intent and purpose to place upon the plaintiff, and have placed upon the plaintiff, more than its just share of the taxes of said state, and to discriminate, and have discriminated, against the plaintiff, in violation of the rights of the plaintiff under the provisions of the Constitution of the State of Wyoming and the Constitution of the United States.

15. Plaintiff says that said State Board of Equalization has certified the aforesaid unlawful valuation of $7,881,-003.94 to the county assessors, and apportioned the same to the counties in which plaintiff's property is located as follows:

To Converse County	$2,017,039.00;
To Fremont County	$2,176,159.00;
To Natrona County	$2,416,539.00; and
To Niobrara County	$1,271.267.00;

and that the said respective valuations have been by the assessors of said counties spread upon the tax assessment rolls of said respective counties and by them certified to the defendants County Treasurers for collection; that the defendants claim and unless restrained by order of this court, will collect from, and compel the plaintiff to pay, in taxes upon the aforesaid unlawful valuations the following amounts:

To Converse County	$40,042.27
To Fremont County	$48,223.02
To Natrona County	$47,701.82
To Niobrara County	$32,639.01

That under the statutes of the State of Wyoming, one-half of plaintiff's taxes will become delinquent on the 10th day of November, 1931, and one-half on the 10th day of May, 1932, provided that if no part thereof shall be paid before the said 10th day of November, 1931, the whole thereof will become delinquent on the first day of January, 1932, and said taxes will draw interest after the same be-[fol. 7] come delinquent at the rate of 15% per annum; and if said taxes are not paid, plaintiff's property will be distrained and sold to collect the same. And plaintiff says that the aforesaid taxes constitute a lien upon plaintiff's property located in the said counties, and a cloud upon plaintiff's title to the same, and that they will seriously interfere with the efforts and ability of the plaintiff to finance its operations and carry on its business as a common carrier of interstate commerce.

16. Plaintiff says that it has no plain, speedy and adequate remedy at law, and that unless the injunction prayed for is granted by this Court, the unlawful acts herein com-

plained of will result in great and irreparable loss to the plaintiff.

17. Plaintiff says that the actual value of its property in Wyoming, subject to valuation and assessment by the State Board of Equalization is $5,849,570.00, and no more; that in order to make the valuation on plaintiff's property uniform with that placed on property in said state generally, as aforesaid, its property ought to be valued at not more than $3,509,742.00, apportioned to the several counties as provided by law, and plaintiff says that it admits that taxes for the year 1931 are properly assessable upon its property in the amounts and by the counties following, and no more, that is to say:

Converse County	$24,025.37
Fremont County	$28,933.81
Natrona County	$28,621.09
Niobrara County	$19,583.41

that one-half of each of said amounts has become due and payable; that it is now and always has been willing to do justice and to pay all taxes legally chargeable to it; that it has tendered and offered to pay to the respective defendants the full amount now due and payable, and admitted by plaintiff to be due and payable, that is to say:

To defendant treasurer of Converse County	$12,012.69
To defendant treasurer of Fremont County	$14,466.91
To defendant treasurer of Natrona County	$14,310.55
To defendant treasurer of Niobrara County	$9,791.71

and that it is ready and willing to pay such other amounts, if any, as and when the court shall determine the same to be due and payable.

[fol. 8] Wherefore, plaintiff prays that a temporary injunction may be granted and issued against the defendants, and each of them, restraining and enjoining them from collecting, or attempting to collect, from the plaintiff, by distraint or otherwise, any sum of money in taxes above the amount herein admitted to be lawful and just, and that upon hearing and trial said temporary injunction be made permanent; that upon presentation of this bill the court fix an amount which the defendant ought forthwith to pay to each of the defendants pending the final determination of

this cause; for its costs herein to be taxed, and for such other and further relief as to the court may seem just and equitable.

Chicago and North Western Railway Company, a Corporation, Plaintiff, by R. R. Rose, Vincent Mulvaney, Wilfrid O'Leary, Samuel H. Cady, Its Attorneys.

Duly sworn to by Wilfrid O'Leary. Jurat omitted in printing.

In United States District Court

Temporary Restraining Order—Filed Nov. 7, 1931

The above entitled matter coming on for hearing exparte this 7 day of November, 1931, upon plaintiff's bill in equity, and the application for a restraining order therein contained, and upon affidavits supporting the allegations [fol. 9] contained in said bill, and it appearing to the court that plaintiff claims that taxes have been levied against its property in the several counties mentioned in plaintiff's bill in equity in excess of the amounts admitted by it to be due; that it has made a tender to the several defendants of the taxes admitted by it to be due; that under the laws of the State of Wyoming, taxes become delinquent on the 10th day of November of each year; that if no payment of taxes is made by the defendant on or before the 10th day of the present month, except by order of the court its taxes will become delinquent and severe statutory penalties will be imposed; that delinquent taxes constitute a lien upon taxpayers' property under the statutes of said state; that plaintiff is willing to pay the first installment of the taxes upon its property which it admits and believes to be proper; that there is not sufficient time after the filing of the above entitled suit and before the date upon which taxes in said state become delinquent to give notice to the defendants of a hearing on plaintiff's application for a restraining order, and that irreparable loss and damage will be sustained by the plaintiff unless an order is issued restraining the defendants from collecting, or attempting to collect, from the plaintiff its taxes in excess of the amount tendered; and it appearing upon the face of plaintiff's bill in equity, that the defendants, unless restrained by order of the court, will

proceed immediately after the 10th day of the present month to collect from the plaintiff, taxes in excess of the amount admitted by it, and appearing on the face of its bill to be proper; and it appearing to the court that the best interests of plaintiff and defendants require that a restraining order be issued, and that whatever loss or damages may be sustained by the defendants by reason of such restraining order, if any there be, can and will be covered by the bond hereinafter provided for; and it further appearing to the court upon the allegations of plaintiff's bill, the same being positively verified, and upon the affidavits submitted in support thereof, that the plaintiff admits that there is due on its first installment of taxes to the County of Converse the sum of $12,012.69, and to the County of Fremont, the sum of $14,466.91, and to the County of Natrona, the sum of $14,310.55, and to the County of Niobrara the sum of $9,791.71, which said sums have been tendered to the respective county treasurers of said counties respectively, and that said amounts are the amounts [fol. 10] which the plaintiff should forthwith and pending the final determination of the issues presented in plaintiff's said bill, pay to said county treasurers respectively:

Now, Therefore, It Is Ordered That plaintiff forthwith pay to the Treasurer of Converse County the sum of $12,012.69, and to the Treasurer of Fremont County, the sum of $14,466.91, and to the Treasurer of Natrona County, the sum of $14,310.55, and to the Treasurer of Niobrara County, the sum of $9,791.71, to be applied on the first installment of taxes which shall be determined by the court to have been properly assessed and unpaid on the property of the plaintiff in said counties respectively.

And It Is Further Ordered that said defendants, and each of them be, and they are hereby restrained until the further order of the court, from collecting, or attempting to collect, from the plaintiff, or out of its property, or any thereof, any sum or sums of money in excess of the respective amounts herein ordered to be paid by the plaintiff to the defendants,

And It Is Further Ordered that plaintiff forthwith file in the office of the clerk of this court its surety bond in the sum of $3,000.00 to each of the defendants, conditioned upon the payment of such costs and damages as may be incurred or suffered by such defendants in the event it be

found by the court that this restraining order shall have been wrongfully issued, and that said defendants shall have been by this order wrongfully restrained,

And It Is Further Ordered that this restraining shall expire within ten days from the date hereof unless within said time the same is extended for good cause shown, or upon stipulation of the parties,

And It Is Further Ordered that this cause be and the same is hereby set down for hearing upon plaintiff's application for a temporary injunction on the 16 day of November, 1931, at 10 o'clock in the forenoon of said day.

Done in Open Court at Cheyenne, Wyoming, this 7 day of November, 1931.

By the Court.

T. Blake Kennedy, Judge.

[fol. 11] In United States District Court

Order for Temporary Injunction—Filed Dec. 28, 1931

The above matter came on upon notice to all the defendants for hearing upon plaintiff's application for a temporary injunction, and upon defendants' motion to dismiss on the 28th day of December, 1931, the plaintiff's application for a temporary injunction being submitted on its verified bill of complint and affidavits attached thereto, and the affidavits of T. W. Jaycox and R. A. Miller, and no testimony being submitted on behalf of the defendants, and arguments being heard on said motion, and in opposition thereto, and in support of plaintiff's application for a temporary injunction, and in opposition thereto, and the court being fully advised, and it appearing to the court upon the showing made that taxes have been levied against the property of the plaintiff in the several counties mentioned in plaintiff's bill of complaint in excess of the amounts which should properly be levied against said property; that the plaintiff in its bill admitted certain amounts to be due and owing from it to the four defendants, respectively; and that the plaintiff, under order of the court issued upon the filing of its bill, has paid to the said defendants the amounts admitted by it to be due and owing and ordered by the court to be paid; that the taxes

levied upon plaintiff's property constitute a lien upon the same; that unless restrained by order of the court the defendants will proceed to collect from the plaintiff all taxes claimed by them to be due from the plaintiff, the said taxes appearing upon the showing made to be greatly in excess of the amounts due; and that unless enjoined from the collection of said taxes until final disposition of this cause irreparable loss and damage will be sustained by the plaintiff;

Now, Therefore, It Is Ordered, That the defendants and each of them be, and each of them are, temporarily, and until further order of the court enjoined from collecting, or attempting to collect, from the plaintiff any taxes in excess of the amounts admitted in plaintiff's bill to be owing to the respective defendants, to be payable on or before the 10th day of May, 1932;

And It Is Further Ordered that this restraining shall expire in the office of the clerk of this court its surety bonds to the defendants conditioned upon the payment of [fol. 12] such costs and damages as may be incurred or suffered by such defendants in the event it be found and determined by the court that this temporary injunction shall have been wrongfully issued, and that defendants shall have been by this order wrongfully enjoined, the said bonds to be in the following amounts, that is to say: To Thomas C. Rowley, as Treasurer of Converse County, Wyoming, the sum of $19,000.00; To Charles T. Cole, as Treasurer of Fremont County, Wyoming, the sum of $23,000.00; to Alta Pearl Massee, as Treasurer of Natrona County, Wyoming, the sum of $23,000.00; and to D. A. Shoopman, as Treasurer of Niobrara County, Wyoming, the sum of $17,000.00.

And It Is Further Ordered that the defendants file their answers to plaintiff's bill of complaint in the office of the clerk of this court on or before the 8th day of January, 1932.

And It Is Further Ordered that the motion of defendants to dismiss be, and the same is hereby overruled, to all of which the defendants, and each of them, at the time, duly excepted.

And It Is Further Ordered that this cause be, and the same is hereby set down for trial on the 18th day of February, 1932, at 10.00 o'clock in the forenoon of said day.

Done in Open Court at Cheyenne, Wyoming, this 28 day of December, 1931.

By the Court.

T. Blake Kennedy, Judge.

In United States District Court

Answer—Filed Jan. 7, 1932

Comes Now the above named defendants, and for their answer to plaintiff's Bill in Equity, admit, deny and aver as follows:

1. These defendants, for their answer to the allegations of Paragraph 1 of said Bill in Equity, admit that the plaintiff is a corporation organized and existing under the laws, and a citizen, of the State of Illinois.

2. These defendants, for their answer to Paragraph 2 of said Bill in Equity, admit that the defendant, Thomas [fol. 13] C. Rowley, is, and has been throughout the year of 1931, the duly elected, qualified and acting Treasurer of the County of Converse, State of Wyoming, and is a bona fide resident and citizen of said Converse County, State of Wyoming.

3. These defendants, for their answer to Paragraph 3 of said Bill in Equity, admit that the defendant, Charles T. Cole, is, and has been during the year of 1931, the duly elected, qualified and acting Treasurer of the County of Fremont, State of Wyoming, and is a bona fide resident and citizen of said Fremont County, State of Wyoming.

4. These defendants, for their answer to Paragraph 4 of said Bill in Equity, admit that the defendant, Alta Pearl Massee, is, and has been during the year of 1931, the duly elected, qualified and acting Treasurer of the County of Natrona, State of Wyoming, and is a bona fide resident and citizen of said Natrona County, State of Wyoming.

5. These defendants, for their answer to Paragraph 5 of said Bill in Equity, admit that the defendant, D. A. Shoopman, is the duly appointed, qualified and acting Treasurer of the County of Niobrara, State of Wyoming, and is a

bona fide resident and citizen of said Niobrara County, State of Wyoming.

6. These defendants, for their answer to Paragraph 6 of said Bill in Equity, admit that the amount involved in this suit, exclusive of costs and interest, exceeds the sum of Three Thousand Dollars, ($3,000.00), as to each of the defendants herein named; deny that this suit is a controversy wholly between the citizens of different states.

7. These defendants, for their answer to Paragraph 7 of said Bill in Equity, admit that the Fourteenth Amendment to the Constitution of the United States provides that no state shall make or enforce any law which shall abridge the privileges of immunity of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor shall any state deny to any person within its jurisdiction the equal protection of the law; and further admit that Section 8 of Article I of said Constitution gives to Congress power to regulate commerce among the several states. These defendants deny that this suit involves the construction of said constitutional provisions; deny that plaintiff has at any time, by reason of the acts of these defendants as com-[fol. 14] plained of in said Bill in Equity, been deprived of the full protection and benefit of said constitutional provisions; deny that any acts of these defendants herein have been unlawful and have affected the rights of this plaintiff, and aver that plaintiff has at all times had full protection under, and the benefits of said constitutional provisions in the State of Wyoming.

8. These defendants, for their answer to Paragraph 8 of said Bill in Equity, admit that plaintiff seeks to enjoin the collection by these defendants of certain taxes levied against the property of plaintiff in the State of Wyoming; but deny that said taxes are illegal, and deny that there is any irregularity in the levy of said taxes upon the property of plaintiff and in the demand for payment of said taxes. These defendants deny that plaintiff's property in the State of Wyoming is assessed at a figure greatly in excess of its actual value; deny that other property than that of plaintiff in the State of Wyoming is valued and assessed at not more than sixty per centum of its actual value, and allege the fact to be that all property other

than that of plaintiff is lawfully assessed and taxed; and further allege the fact to be that plaintiff's property is assessed at a sum less in amount than the actual value thereof, and that the actual value of plaintiff's property in the State of Wyoming is the sum of $12,459,492.00. These defendants deny that there has been any unlawful discrimination against the plaintiff in the valuation of its property in Wyoming for taxation and allege the fact to be that the plaintiff has endeavored to induce the State Board of Equalization to discriminate against other taxpayers in Wyoming by having said State Board of Equalization fix the valuation of plaintiff's property in Wyoming at a sum much less than the actual value thereof.

9. These defendants, for their answer to Paragraph 9 of said Bill in Equity, admit that, prior to the first Monday in June, 1931, plaintiff made out its return containing a sworn statement and schedule of all its property, containing data and information required to be furnished in such schedule and statement under the laws of the State of Wyoming, as provided in Chapter 57, Session Laws of Wyoming, 1923; admit that such statement was filed in the office of the Wyoming State Board of Equalization, and aver that said statement so filed by plaintiff showed a valu- [fol. 15] ation of plaintiff's property in Wyoming in the sum of $8,281,950.00; further aver that the actual value of plaintiff's property in Wyoming is $12,459,492.00; that the valuation of said property for taxation in Wyoming for the year 1931 in the sum of $7,881,003.94, was determined without considering all the factors legally entitled to be considered in determining the actual value of plaintiff's property for taxation, and that said sum of $7,881,003.94 is less than the actual value of said property.

10. These defendants, for their answer to Paragraph 10 of said Bill in Equity, admit that a valuation was placed by the Board of Equalization upon plaintiff's property in the State of Wyoming in the sum of $7,989,587.00; admit that before certifying a valuation and assessment as made by the State Board of Equalization upon the plaintiff's property in the several counties in Wyoming to the county assessors of said counties, the said Board did duly notify the plaintiff of the aforesaid valuation and assessment as made and fixed by it, and fixed the 9th day of July, 1931, as a time

when the plaintiff might appear before said Board and present its objections to such valuation and assessment.

11. These defendants, for their answer to Paragraph 11 of said Bill in Equity, admit that on the 9th day of July, A. D. 1931, a hearing was held before the said State Board of Equalization upon objections presented by the plaintiff, and aver that the valuation of plaintiff's property was, as a result of said hearing, reduced from the sum of $7,989,-587.00 to the sum of $7,881,003.94; that plaintiff made no complaint or protest against said valuation of its property in Wyoming. These defendants admit that on the 14th day of July, 1931, the State Board of Equalization fixed the valuation of the property of the plaintiff in the State of Wyoming in the sum of $7,881,003.94; but aver that the actual value of said property in Wyoming was, and is, $12,-459,492.00; deny that $7,881,003.94 is $2,031,433.94 in excess of the actual value of said property, and aver that $7,881,-003.94 is $4,579,488.06 less than the actual value of said property. These defendants further deny that said Board has at any time during the past five years prior to the filing of plaintiff's Bill in Equity, valued the property of plaintiff at a figure more than $2,000,000.00 in excess of the actual value of said property, and aver the fact to be that [fol. 16] plaintiff's property has not, during the past five years, been valued for taxation purposes in Wyoming in any sum in excess of its actual value; deny that the valuation fixed as the assessment for taxation of said property in Wyoming for the year 1931, in the sum of $7,881,003.94, was in excess of the actual value of said property, and aver that said sum so fixed was $4,579,488.06 less than the actual value thereof. These defendants deny that the property of the plaintiff has been subjected to an excess valuation exceeding the actual value thereof in any sum, and aver the tax which the plaintiff has paid in said years upon said property, has been based upon a value of said property in the State of Wyoming not in excess of the actual value thereof; admit that the plaintiff has, during the said years, entered objections to the valuations fixed, and aver that plaintiff has endeavored to induce the State Board of Equalization to place a value on said property less than the act*ion* value thereof for the purpose of effecting a discrimination in favor of the plaintiff and against other taxpayers in the State of Wyoming by permitting plaintiff to pay less than

its full lawful tax in the State of Wyoming; that said plaintiff has, during said time, endeavored to induce the State Board of Equalization to adopt a formula for the purpose of determining the value of plaintiff's property in Wyoming for taxation, which would be inequitable and unfair and would determine said property, if arrived at by said formula, to be of much less value for taxation than the actual value of the same; that said Board has each year, refused to accept such formula and refused to permit plaintiff to pay its tax upon its property determined by such inequitable and unfair method of valuation.

12. These defendants, for their answer to Paragraph 12 of said Bill in Equity, admit that the plaintiff owns and operates a system of railroads with lines extending into and through the states of Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota and Wyoming; admit that it owns and operates in the State of Wyoming, 278.35 miles of main track, and aver that said main track in Wyoming is a part of said system of railroads, and admit that the plaintiff owns in other states than the State of Wyoming, main track miles of road in the amount of 8,180.20 miles; deny that the main track miles [fol. 17] belonging to the plaintiff in the State of Wyoming are less than one-half the value per mile of its miles of main track located outside the State of Wyoming; aver that said main track miles of road in Wyoming are of average value with plaintiff's total main track miles of road in said system of railroads; deny that plaintiff has no switching or terminal facilities or other property aside from its main track of considerable value used in its railroad operations located in the State of Wyoming, and aver that plaintiff has, throughout the entire length of its main track mileage in Wyoming, switching and terminal facilities of a substantial character and of great value. These defendants admit that the plaintiff owns and operates, in connection with its system in other states, elevated tracks, elevators, shops, terminal facilities, double main track lines, ore docks, railway stations and other equipment; but for want of information sufficient to form a belief, deny that said improvements and facilities are of great value; deny that the value of plaintiff's property used in its railway operations and located outside the State of Wyoming, is more than twice the value per mile of road than the said value of its said

property so used and located in the State of Wyoming, and aver that plaintiff's property used and located within the State of Wyoming is of an average value per mile of road with plaintiff's property used and located outside the State of Wyoming. These defendants admit that the Wyoming State Board of Equalization has knowledge of the value of said property of the plaintiff within and without the State of Wyoming, and deny that said Board knew that plaintiff's property used and located outside the State of Wyoming was of more than twice the value per mile of plaintiff's property used and located within the State of Wyoming, and aver that the State Board of Equalization had knowledge and information concerning the character and extent of said property in its entire railroad system; aver that said property of plaintiff used and located outside the State of Wyoming is not of as great a value per mile as plaintiff's property used and located within the State of Wyoming. These defendants deny that the State Board of Equalization determined the entire railway system of the plaintiff used in its railroad operations to be of the value of $375,285,902.00, and aver the fact to be that the plaintiff so valued its property in its entire railway system and used in its railroad operations and represented [fol. 18] to the State Board of Equalization that said amount was the value of its said property in its entire railroad system; admit that the State Board of Equalization considered in fixing the value of plaintiff's property for the purpose of taxation as a factor in making such valuation, the plaintiff's main track miles located within the State of Wyoming as compared to the total main track miles in said entire system; deny that the State Board of Equalization did, arbitrarily and/or unlawfully, fail and neglect to take into account the value of plaintiff's property in Wyoming as compared to the value of its property in other states, and aver that said State Board of Equalization did take into account and consider the value of plaintiff's property in Wyoming as compared to the value of plaintiff's property outside of Wyoming; deny that the value of plaintiff's property in Wyoming is less than one-half of the value per mile of its property located outside the State of Wyoming, and aver that plaintiff's property in Wyoming is of an equal

average value with plaintiff's property located outside of Wyoming, measured by the main track miles in Wyoming, as compared to the main track miles outside of Wyoming; deny that plaintiff's property was valued for taxation by arbitrary and wrongful methods; deny that the value thereof was, by said Board, arbitrarily, fraudulently and unlawfully fixed in a sum approximately $2,000,000.00 in excess of the actual value of said property, and aver that the valuation of plaintiff's property in the State of Wyoming was fixed in a sum of $4,579,488.00 less than the actual value thereof, and allege the fact to be that said property was assessed in a sum less than the actual value of said property located in Wyoming, and that said value was fixed at a sum less than the actual value of said property in Wyoming because all of the factors lawfully entitled to be and which should have been considered in fixing said valuation, were not so considered. These defendants deny that the method used for determining the value of plaintiff's property in Wyoming for taxation purposes, was arbitrary, wrongful or unlawful, and aver that the valuation of plaintiff's property in Wyoming was not determined in an arbitrary or wrongful method, nor in an unlawful manner, except in that said property in Wyoming was not valued for taxation at its actual value, but in a sum less than said actual value thereof. These defendants deny that [fol. 19] the use and consideration of the net operating revenue as a factor in determining said value, was arbitrary, wrongful or unlawful, and aver that a consideration of the net operating revenue as a factor in determining the valuation of plaintiff's property in Wyoming for taxation purposes is a recognized and lawful consideration, and was so considered and used in determining the value of plaintiff's property in Wyoming for taxation purposes.

13. These defendants, for their answer to Paragraph 13 of said Bill in Equity, deny that the State Board of Equalization, particularly in the year 1931, and for several years last past, unlawfully, arbitrarily, knowingly and intentionally, valued plaintiff's property for taxation purposes in the State of Wyoming at about 33⅓% in excess of the actual value thereof, and allege the fact to be that the property of the plaintiff has not been for several years last past, nor in the year 1931, valued for purposes of taxation in Wyoming at a value in excess of its actual value; that

such property was not unlawfully, arbitrarily, knowingly and intentionally valued in a sum in excess of the actual value of such property for taxation purposes in the year 1931, nor for several years last past, by the State Board of Equalization of the State of Wyoming.

14. These defendants, for their answer to Paragraph 14 of said Bill in Equity, deny that it has been the common and universal practice of the county assessors of all of the counties in the State of Wyoming, purposely, intentionally and systematically to place a valuation for purposes of taxation upon the property generally of the taxpayers of said state, greatly less than the actual value of said property, and aver that the valuation of property generally for taxation in the several counties in the State of Wyoming has been determined upon a just valuation at and not less than the actual value thereof; deny that in the years of 1919 and 1920, such property so assessed by the said county assessors, was valued from ten to fifty per centum of the actual value thereof, and aver that said property during the years of 1919 and 1920 was valued for taxation at the actual value thereof; deny that in the year of 1931, the property generally in the State of Wyoming assessed by the county assessors of the said state, was intentionally valued by said county assessors for taxation purposes at not exceeding sixty per centum of the actual value thereof, [fol. 20] and aver the fact to be that property generally in the State of Wyoming assessed by the county assessors for taxation purposes, was not assessed on a valuation less than the actual value thereof; that said assessors endeavored to assess said property generally at its actual value; deny that for years last past and including the year 1931, the said county assessors, with the knowledge and consent of the State Board of Equalization, and knowingly and intentionally omitted entirely from the assessment rolls, certain classes of property legally taxable, not exempt from taxation, amounting in value to the sum of approximately one-fifth of the total assessed valuation of all the property of said State, and aver the fact to be that no property legally taxable in the State of Wyoming and not exempt by statute, has been knowingly and intentionally omitted from the assessment rolls. These defendants aver that said State Board of Equalization has directed said county assessors to assess all property not exempt from taxation

at the actual value thereof and warned said assessors of the penalty imposed by law for failure to so assess all property not exempt from taxation; deny that any undervaluation of property by the county assessors, or any omission by said assessors of property from the assessment rolls has been made and is being made by said county assessors systematically, notoriously, unlawfully, intentionally and with the knowledge and approval of the State Board of Equalization, and for the purpose of unlawfully requiring and compelling plaintiff to pay taxes in any sum in excess of the amount of taxes justly and legally due from it. These defendants further deny that the valuation and assessment of the property of the plaintiff by the State Board of Equalization has been in amount in excess of the actual value of said property; deny that there has been any systematic and intentional undervaluation by the county assessors of all the property located in the State of Wyoming subject to assessment by said county assessors; deny that the action of the county assessors in valuing and assessing all the property located in the State of Wyoming has operated and does operate fraudulently to discriminate against the plaintiff in violation of its rights under the Fourteenth Amendment of the Constitution of the United States.

These defendants further deny that they have acted arbi- [fol. 21] trarily and with fraudulent intent and purpose to place upon the plaintiff, or have placed upon the plaintiff, more than its just share of the taxes of said State; deny that they have discriminated against the plaintiff in violation of the rights of plaintiff under the provisions of the Constitution of the United States; deny that a valuation has been fixed and the assessment for tax purposes placed upon plaintiff's property in excess of the actual value thereof; and aver that plaintiff's property in Wyoming has been assessed and valued for purposes of taxation at a sum less than the actual value thereof; deny that the valuation of property generally throughout the State of Wyoming other than that of the plaintiff, has been fixed at not more than sixty per centum of its value; and allege the fact to be that all of said property subject to taxation in the State of Wyoming except the property of plaintiff has been valued for the purpose of taxation at not less than its actual value and

without discrimination against the plaintiff; deny that plaintiff has had placed upon it more than its just share of the taxes of the State of Wyoming; and aver that plaintiff has not had placed upon it its just share of the taxes of the state.

15. These defendants, for their answer to Paragraph 15 of said Bill in Equity, admit that the valuation of $7,881,003.94 was the equalized value of plaintiff's property in the counties of Converse, Fremont, Natrona and Niobrara as certified to said county assessors by the State Board of Equalization; that the value in Converse County of plaintiff's property for taxation purposes, was $2,017,039.00; that the value of plaintiff's property in Fremont County for taxation, was $2,176,159.00; that the value of plaintiff's property in Natrona County for taxation, was $2,416,339.00; and that the value of plaintiff's property in Niobrara County for taxation, was $1,271,267.00; admit that said amounts so stated above were duly certified by the State Board of Equalization as the value in each of said counties of plaintiff's property upon which the tax levy against the plaintiff's property should be made. These defendants deny that said valuations were unlawful, except in that the valuations as so certified are, in fact, less than the actual value of the property of plaintiff in said counties and subject to taxation therein, and less than the actual value as fixed and certified to the State Board of Equaliza-
[fol. 22] tion by the plaintiff; admit that the respective valuations as made by the assessors in said counties, were spread upon the tax assessment rolls of said respective counties, and by them certified to the defendant county treasurers of said counties for collection; deny that defendants claim, and unless restrained by order of this court, will collect any tax or compel the plaintiff to pay any tax or any sum in taxes upon the property of the plaintiff in the counties above named in Wyoming, upon an unlawful valuation; deny that there was an excessive and, therefore, unlawful valuation of plaintiff's property in Converse County, and allege the fact to be that the actual value of plaintiff's property, as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $2,017,039.00; deny that there was an excessive, and, therefore, an unlawful valuation of plaintiff's prop-

erty in Fremont County, and allege the fact to be that the actual value of plaintiff's property as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $2,176,159.00; deny that there was an excessive, and, therefore, an unlawful valuation of plaintiff's property in Natrona County, and allege the fact to be that the actual value of plaintiff's property as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $2,416,339.00; deny that there was an excessive and, therefore, an unlawful valuation of plaintiff's property in Niobrara County, and allege the fact to be that the actual value of plaintiff's property as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $1,271,267.00.

These defendants deny that there has been an excessive and unlawful valuation of plaintiff's property within the State of Wyoming, and deny that there has been any unlawful discrimination in the valuation of the property of the plaintiff as against other property subject to taxation in the State of Wyoming; deny that there has been, in the fixing of the values and the assessment for taxation of plaintiff's property, any violation of the rights of the plaintiff under the provisions of the Constitution of the United States.

[fol. 23] These defendants admit that under the statutes of the State of Wyoming, one-half of plaintiff's taxes will become delinquent on the 10th day of November, 1931, and one-half delinquent on the 10th day of May, 1932, provided that if no part thereof shall be paid before the said 10th day of November, 1931, the whole thereof will become delinquent on the 1st day of January, 1932. These defendants further admit that said taxes, if not paid at the time herein stated, will draw interest after the same become delinquent at the rate of 15% per annum; admit that if said taxes are not paid, plaintiff's property will be distrained and sold for the collection of said tax; admit that said taxes constitute a lien upon plaintiff's property located in said counties in the State of Wyoming, and that said tax, if not paid, will constitute a cloud upon plaintiff's title to said property;

but for want of information sufficient to form a belief, deny that such tax will interfere with the efforts and ability of the plaintiff to finance its operations and carry on its business as a common carrier of interstate commerce.

16. These defendants, for their answer to Paragraph 16 of said Bill in Equity, deny that plaintiff has no plain, speedy and adequate remedy at law; deny that any unlawful acts have been committed by said defendants against plaintiff or plaintiff's property, as in said Bill in Equity complained; deny that any acts of these defendants will result in great and irreparable loss to the plaintiff; deny that unless an injunction, as prayed for, is granted by the court, irreparable loss will occur to the plaintiff, and alleges the fact to be that plaintiff has a plain, speedy and adequate remedy at law and can recover any sum or sums illegally paid as a tax against the property of the plaintiff; that plaintiff will sustain no great and irreparable loss by reason of any act or acts committed by said defendants unless an injunction be granted, as prayed for by the plaintiff.

17. These defendants, for their answer to Paragraph 17 of said Bill in Equity, deny that the actual value of plaintiff's property in the State of Wyoming, subject to valuation and assessment by the State Board of Equalization, is $5,849,570.00, and alleges the fact to be that the actual value of said property in the State of Wyoming is $12,459,492.00; deny that for the purpose of making the valuation [fol. 24] of plaintiff's property uniform with that placed on property in said state generally, it should be valued at not more than $3,509,742.00, apportioned to the several counties, as provided by law, and allege the fact to be that the lawful valuation of plaintiff's property in said State of Wyoming is $12,459,492.00. Defendants aver that plaintiff, in its annual statement as filed with the State Board of Equalization prior to the first Monday in June, 1931, certified a valuation fixed by plaintiff as the actual value of its property subject to taxation in Wyoming, to be in the sum of $8,281,950.00; and defendants aver that said sum of $8,281,950.00, as so certified to said State Board of Equalization by plaintiff, was not the actual value of plaintiff's property owned, located and used by plaintiff in the State of Wyoming; that said actual value is $12,459,492.00.

These defendants deny that the taxes for the year of 1931 are properly assessable upon plaintiff's property in the County of Converse in the sum of $24,025.37; deny that the taxes for the year 1931 are properly assessable upon plaintiff's property in the County of Fremont in the sum of $28,933.81; deny that the taxes for the year 1931 are properly assessable upon plaintiff's property in the County of Natrona in the sum of $28,621.09; deny that the taxes for the year 1931 are properly assessable upon plaintiff's property in the County of Niobrara in the sum of $19,583.41—these figures being merely speculative and based upon 60% of the amounts assessed against plaintiff in the various counties of the State and which latter amounts are 60% of those certified to said county assessors against plaintiff's property on an equalized valuation of $7,881,003.94.

These defendants aver the fact to be that the amount of the taxes for the year 1931 on plaintiff's property in the County of Converse is the sum of $63,299.31, based on the actual value of plaintiff's property located in said Converse County; alleges the fact to be that the taxes for the year 1931 on plaintiff's property in the County of Fremont is the sum of $76,232.08, based on the actual value of plaintiff's property located in said Fremont County; allege the fact to be that the taxes for the year 1931 on plaintiff's property in the County of Natrona is the sum of $75,415.76, based on the actual value of plaintiff's property located in said Natrona County; allege the fact to be that the taxes [fol. 25] for the year 1931 on plaintiff's property in the County of Niobrara is the sum of $51,592.61, based on the actual value of plaintiff's property located in said Niobrara County.

These defendants further aver that $7,881,003.94 is only 63.26% of its actual value, to-wit, $12,459,482.00.

These defendants admit that one-half of the tax legally and lawfully assessed against the plaintiff on its property in the State of Wyoming has become due and payable; deny that plaintiff has always been, and is now willing to do justice and to pay all taxes legally chargeable to it; deny that it has tendered and offered to pay to the defendants herein the full amounts now due and payable, and allege the fact to be that it has refused to pay the full amounts now due and chargeable to it as taxes upon its property in

Wyoming and allege the fact to be that it has refused to tender and has not offered to pay defendants the full amounts now due and payable as taxes upon its property within the counties of Converse, Fremont, Natrona and Niobrara, in the State of Wyoming, but admit that plaintiff has offered to pay the following amounts, which it alleges are the full amounts now due and payable upon its property within said counties, and admit that said sums have been tendered to the said counties as follows, to-wit:

To defendant Treasurer of Converse County, $12,012.69;
To defendant Treasurer of Fremont County, $14,466.91;
To defendant Treasurer of Natrona County, $14,310.55;
To defendant Treasurer of Niobrara County, $9,761.91;

and said defendants aver that said respective sums as so tendered, are not the full legal amounts lawfully due from said plaintiff to said defendants, but are less than said lawful amounts.

For want of information sufficient to form a belief, these defendants deny that the plaintiff is ready and willing to pay such other amounts, if any, as and when the court shall determine the same to be due and payable.

These defendants aver that plaintiff, in its annual statement, as filed with the State Board of Equalization prior to the first Monday in June, 1931, did duly submit for the year 1930, its verified tax return to said State Board of Equalization and therein certified a value fixed and determined by [fol. 26] plaintiff as the actual value of its property subject to taxation in Wyoming, to-wit, the sum of $8,281,950.00, as the basis for computing plaintiff's tax in the State of Wyoming, and that plaintiff is, and in equity and good conscience ought to be estopped from now claiming that its property subject to taxation in the State of Wyoming is of a less actual value than the sum of $8,281,950.00, so certified by it to the State Board of Equalization.

These defendants aver that during the period from 1926 to 1930, inclusive, said plaintiff did duly submit its verified tax return statement in the following figures, to-wit:

1926—$9,517,351.00.
1927—$8,532,681.00.
1928—$8,274,486.00.
1929—$8,262,732.00.
1930—$8,281,950.00.

that for said respective years and upon objections as made by plaintiff, the valuation of plaintiff's property located and used in Wyoming was reduced and valued for taxation in a sum less than the certified value submitted by said plaintiff to said State Board of Equalization and in the following amounts, to-wit:

1926—$7,955,791.00.
1927—$8,104,178.00.
1928—$8,000,757.00.
1929—$7,970,916.00.
1930—$7,881,094.00.

that during each of said years the said property of the plaintiff has been assessed upon a valuation less in amount than the actual value thereof.

Defendants aver that the amount of tax lawfully assessable against the property of the plaintiff located and used in the State of Wyoming for the year 1931 is the sum of $271,539.76; and that said sum should be paid as taxes in the following counties as follows:

$65,299.31 to the County Treasurer of Converse County;
$76,232.08 to the County Treasurer of Fremont County;
$75,415.76 to the County Treasurer of Natrona County;
$56,592.61 to the County Treasurer of Niobrara County;

[fol. 27] that the plaintiff is lawfully indebted to the State of Wyoming for the payment of said respective sums to said county treasurers as the lawful tax assessable against its property in Wyoming for the year 1931 based upon the actual value of the property of the plaintiff used and located within the State of Wyoming.

Wherefore, these defendants respectfully pray that the plaintiff's prayer for a permanent injunction enjoining the defendants, as county treasurers of said counties from collecting the taxes due from the plaintiff to said county treasurers be denied; that the temporary injunction heretofore granted be vacated and dissolved; that plaintiff be ordered to pay in the manner provided by law the sum of $63,299.31, as taxes for the year 1931 to the County Treasurer of Converse County; $76,232.08, as taxes for the year 1931, to the County Treasurer of Fremont County; $75,415.76, as taxes for the year 1931, to the County Treasurer of Na-

trona County; and $56,592.61, as taxes for the year 1931, to the County Treasurer of Niobrara County; that plaintiff's Bill in Equity be dismissed; that the defendants recover their costs herein and be granted such other and further relief as to this court may seem just and equitable.

J. A. Greenwood, Attorney General of Wyoming; Richard J. Jackson, Deputy Attorney General of Wyoming; George W. Ferguson, Assistant Attorney General of Wyoming, Attorneys for Defendants.

Duly sworn to by James A. Greenwood. Jurat omitted in printing.

[fol. 28] IN UNITED STATES DISTRICT COURT

R. R. Rose and Vincent Mulvaney of Casper Wyo., and Wilfred O'Leary of Cheyenne, Wyo., for Plaintiff.

J. A. Greenwood, Attorney General, Richard J. Jackson, Deputy Attorney General, George W. Ferguson and R. Dwight Wallace, Assistant Attorneys General, of Cheyenne, Wyo., and John D. Dawson of Douglas, Wyo., H. S. Harnsberger of Lander, Wyo., George A. Weedell of Casper, Wyo., and F. A. Barrett of Lusk, Wyo., for Defendants.

JUDGE'S MEMORANDUM—Filed Aug. 30, 1932

Decided August 30, 1932

KENNEDY, Judge:

The above entitled cause is a suit in equity against the treasurers of four counties in the State of Wyoming which the railroad of plaintiff traverses, to restrain the collection of alleged illegal taxes. It is brought upon the theory that the property of the plaintiff has been systematically and intentionally overvalued by the State Board of Equalization and that the property of other taxpayers in the same counties has been systematically and intentionally undervalued, resulting in a discrimination against the plaintiff. Upon the filing of the suit a temporary restraining order was sought and upon the payment of a certain portion of the assesed tax by the plaintiff to the respective treasurers, such restraining

order was granted as to the balance and the matter thereupon set down for hearing for a temporary injunction upon notice. After several continuances by consent of counsel, a hearing was had and an interlocutory injunction allowed. Issues were thereafter joined and the case proceeded to final hearing and a time given for the filing of trial briefs.

Upon the issues, the suit naturally divides itself into two phases; (1) the question as to whether this court has jurisdiction of a case of this character and, (2) in the event the jurisdiction of the court is sustained, whether the plaintiff is entitled to the relief prayed for upon the evidence offered in support of its bill.

Two recent decisions of the Supreme Court seriously challenge the equity jurisdiction of the Federal district court in suits to restrain the collection of taxes. These decisions [fol. 29] came to light after the case had been heard upon the merits. They seem to be primarily based upon the provisions of 28 U. S. C. A. 384 (R. S. Sec. 723), which reads:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

The pertinent sections of the Wyoming statutes, found in Wyoming Revised Statutes 1931, are as follows:

Sec. 89-4202: "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action."

Sec. 89-4203: "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officers who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments."

Sec. 115-311: "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation, shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth."

[fol. 30] It would seem that the taxpayer in Wyoming is afforded various methods of relief against illegal taxation. In the case of Matthews et al. v. Rodgers, 284 U. S. 521, decided February 15, 1932, Mr. Justice Stone in speaking for the court at page 524, 525, 526, says:

"The right of appellees, if any, to maintain the present suit, is conferred by Sec. 24 of the Judicial Code, 28 U. S. C., Sec. 41 (1), which, regardless of the citizenship of the parties to the suit, vests in district courts of the United States jurisdiction over suits at law or in equity 'arising under the Constitution or laws of the United States,' where the matter in controversy exceeds $3,000. Although the present suit arises under the Constitution of the United States, see Davis v. Wallace, 257 U. S. 478, and it being assumed, without deciding, that the jurisdictional amount is involved, the suit cannot be maintained if not within the equity jurisdiction of the district court. The want of equity jurisdiction, if obvious, may and should be objected to by the court of its own motion. Twist v. Prairie Oil Co., 274 U. S. 684, 690. In other cases, this jurisdictional requirement, unlike the others mentioned, may be treated as waived if the objection is not presented by the defendant in limine. Duignan v. United States, 274 U. S. 195, 199; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 484; Thompson v. Railroad Companies, 6 Wall. 134; compare Matson Navigation Co. v. United States, ante, p. 352; Hilton v. Dickinson, 108 U. S. 165, 168; Grace v. American Central Ins. Co., 109 U. S. 278, 283-284; Bors v. Preston, 111 U. S. 252, 255. Here, the objection to the equity jurisdiction of the district court was properly raised by appellants' motion to dismiss the bill, and is preserved by their assignments of error in this Court.

"Section 16 of the Judiciary Act of 1789, 1 Stat. 82, perpetuated without material change as Rev. Stat. 723, 28 U. S. C. Sec. 384, Jud. Code Sec. 267, declares that suits in equity shall not be sustained in the courts of the United States 'in any case where plain, adequate and complete remedy may be had at law.' The effect of this section, which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of [fol. 31] equity where the right asserted may be fully protected at law. See Deweese v. Rinhard, 165 U. S. 386, 389; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 214.

"The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this court for review if any federal question be involved, Jud. Code Sec. 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present. See Boise Water Co. v. Boise City, 213 U. S. 276; Skelton v. Platt, 139 U. S. 591; Dows v. Chicago, 11 Wall. 108, 110, 112."

It is now apparent regardless of what formerly appeared to be the theory expressed by that court in Cummings v. National Bank, 101 U. S. 153, that the mere fact of a state statute authorizing a suit to restrain the collection of taxes does not of itself confer jurisdiction of such a suit upon the Federal court. In Matthews v. Rodgers, supra, at page 529, the court says:

"While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by Federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the Federal courts, where the legal remedy is adequate."

[fol. 32] Upon the same day the Supreme Court decided the case of Stratton v. St. Louis Southwestern Railway Co., 284 U. S. 530, in which the holding is expressed in the syllabus in the following language:

"A suit will not lie in a Federal court to enjoin a state officer from collecting a tax that violates the Federal Constitution, where the state law affords a legal remedy through payment of the tax under protest and suit to recover it from the collecting officer, and no special circumstances are alleged in the bill which would render the legal remedy inadequate."

In the face of the exceedingly strong language used by the Supreme Court in Matthews v. Rodgers, a district court should hesitate to assume jurisdiction in cases of this character, unless it appears that plaintiff's asserted right may not be preserved without the Federal court taking jurisdiction. In the case at bar, the plaintiff has the statutory right in the State courts to test its claim by suits to enjoin the collection of the alleged illegal tax. It also has the right to pay the tax and maintain actions at law to recover the same back. It may perhaps bring such causes of action in the Federal court, other proper conditions obtaining.

In any event, as it appears to me, there is nothing in the bill or proofs which justifies the conclusion that the plaintiff does not have a plain, speedy and adequate remedy at law under the Wyoming statutes, which defeats the jurisdiction of the Federal court. The plaintiff in its reply brief relies upon the theory of the avoidance of a multiplicity of suits, but this nowhere appears in the bill nor is there any showing that the bringing of such suits would work a particular hardship or inconvenience upon the plaintiff.

The motion for leave to amend filed after the case was submitted does not appeal to the court as being adequate under the circumstances here existing and it will be overruled. If the restrained tax be paid suits may be immediately brought for the recovery before the fund is disbursed. At most, under the circumstances here, as it appears to me, the test of the validity of the tax through a bill in equity, is perhaps a greater convenience to the plaintiff, but this is not sufficient. The Henrietta Mills v. Rutherford County, 281 U. S. 121. On account of the circumstances heretofore [fol. 33] mentioned, it would seem that the ruling in Wilson v. Illinois Southern Railway Co. et al., 263 U. S. 574, does not apply. The decisions leave the point as appearing in the case at bar somewhat clouded.

The conclusion reached upon the question of jurisdiction makes it unnecessary to consider the other phase of the controversy. Findings, conclusions and a decree dismissing plaintiff's bill with costs and reserving to it proper exceptions, may be prepared through collaboration of counsel and submitted to the court on October 17, 1932, and an order may be entered in instanter fixing the time as aforesaid to submit such findings, conclusions and decree.

IN UNITED STATES DISTRICT COURT

JUDGE'S MEMORANDUM—Filed Nov. 9, 1932

Decided Nov. 9, 1932

KENNEDY, Judge:

This suit is one to restrain the collection of alleged illegal taxes by the treasurers of four counties named as defendants, upon the ground that the taxes so assessed and levied violate the commerce, due process and equal protection clauses of the Federal Constitution. The case was previously argued and submitted to the court, one of the defenses interposed being the lack of jurisdiction of this court upon the ground that the plaintiff had not established that it had no adequate remedy at law. On August 30, 1932, the court filed a written memorandum sustaining such defense and providing for the dismissal of plaintiff's bill, without considering the other points involved. Doubt was

expressed by the decision upon this point, the court relying principally upon the recent decision of the Supreme Court in Matthews v. Rogers, 284 U. S. 521. Thereafter [fol. 34] and before the decree was entered in accordance with the memorandum, counsel for plaintiff requested an opportunity to re-argue the point as to the jurisdiction, which was granted by an order duly entered providing for a reopening of the case. The question of the jurisdiction was again presented in more elaborate form. The court has reached the conclusion that upon a more thorough examination of the authorities, the jurisdiction of the court should be sustained. This conclusion is based upon the theory that, regardless of the plaintiff having failed in the bill to plead the element of multiplicity of suits, yet this element is clearly evident from the fact set up, to the effect that four separate and distinct county treasurers would be necessary defendants in actions for relief in the State courts located in several different judicial districts. This situation brings into force and effect conditions described in some of the Supreme Court decisions which would appear to rule this case. The element of multiplicity of suits has long been regarded as one which, if established, will give a Federal court of equity jurisdiction. In Union Pacific Railway Co. v. Weld County, 247 U. S. 282, Mr. Justice Van Devanter in speaking for the court, says:

"Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See Raymond v. Chicago Union Traction Co., supra, pp. 39-40. If the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for as this court has said, 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief plaintiff ought not to be com-

pelled to speculate upon the chance of his obtaining relief at law.' Davis v. Wakelee, 156 U. S. 680, 688."

Again discussing the point in Wilson v. Illinois Southern Railway Co., 263 U. S. 574, Mr. Justice Holmes at 576, uses the following language:

[fol. 35] "The appellants rely mainly upon Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122. In that case a bill charging fraudulent overvaluation was dismissed and the dismissal was affirmed by this Court on two grounds, that there was an adequate remedy at law and that the plaintiff had not tendered or offered to pay the amount confessedly due. The latter ground is absent here. As to the former it seems to us that the present case is to be distinguished. Keokuk v. Hamilton Bridge Co. v. Salm arose upon an assessment of real estate by county assessors in a single county, as to which the remedies available were pointed out. Here the assessment was of property in five counties, by the State Board of Equalization for 1917 and 1918, and by its successor the State Tax Commission for the two later years. Assuming that in each of the counties before the tax could be collected a judgment must be obtained in the county court in a civil suit and that in such suits the defendants, the present plaintiffs, could set up the facts here relied upon, as in the Keokuk Co.'s case, not only would those suits be many, but there would be insuperable difficulty in determin-g what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties with not improbably different results in each. It seems to us that the right of full defence in those suits, if it exists, is not an adequate remedy at law. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38-40. Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S. 130, 134."

The principle there announced has recently been recognized by a Three-Judge Court in our own Circuit in the case of Broadway Express v. Murray, 60 Fed. (2d) 293, where at 297 Judge Kennemar says:

"The remedy here sought in equity is well founded. It is true the mere illegality of a tax does not authorize an injunction against its enforcement. There must be an ab-

sence of a plain, adequate, and complete legal remedy. Title 28, U. S. Code, Section 384 (28 U. S. C. A. Section 384); Matthews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447; Stratton v. St. Louis S. W. Ry. Co., 284 U. S. 530, 52 S. Ct. 222, 76 L. Ed. 465. But the plaintiff [fol. 36] had no such remedy. The monthly payment of mileage and other annual taxes required by section 9, c. 253, Sess. Laws 1929, would necessitate a multiplicity of suits to test the legality of those taxes between the same parties and involving the same issues."

In any event, a decision on the merits of the case in this court under the circumstances presented, would seem to bring forward a settlement of the litigation in the appellate courts upon all the points involved.

Proceeding therefore to a consideration of the questions involved in the suit upon the merits, we are confronted here with facts which outline in detail the manner in which the State Board of Equalization arrived at the valuation of the plaintiff's property in Wyoming, which was subsequently certified under the statute to the several county boards. The first step taken by the board was, to determine the entire value of the property of the plaintiff wherever located. This item was calculated by taking the average market value of the plaintiff's stocks and bonds over a period of five years and deducting therefrom the value of its non-operating property locally assessed from which a figure of $385,800,085.00 was secured. The next step was to capitalize the average income at six per cent over the same period, which produced the figure of $364,771,720.00. The addition of these two items made a total of $750,571,-805.00. Dividing this figure by two, produced a figure of $375,285,902.00, at which the entire property of plaintiff's system was valued. With this process the plaintiff seems to have no complaint and in fact, advocated its adoption in arriving at the valuation of the system.

The next step taken was in the matter of allot-ing the proper proportion of such value to the property located and assessible in the state. The first factor likewise upon which the plaintiff and defendants agree is, that the traffic units operating in the state is 1.58% of the entire system. The next factor used by the taxing authorities is that of the use of rolling stock, which is determined to be 1.65%

of the whole, likewise acceptable to both plaintiff and defendants. The next factor used was that of operating revenue upon which the parties disagree, plaintiff claiming that the operating revenue as shown by the records of the company should be adopted as the element to be considered, while the testimony tends to show a figure purport-[fol. 37] ing to be adopted by the commission arrived at by taking the gross operating revenue plus the net operating revenue and by the division of the two would give the proper average for this element. The figure arrived at by the board by this method purports to be 1.89%, but which from the items used indicates a mistake in computation of the board, as 1.79% would be the proper result of such average. While the defendants contend that the unit of net operating revenue, which is 1.46%, should have been adopted, it has offered no authorities sustaining such contention and therefore the basis as adopted by the board on this point should not be disturbed, with the exception that the correction should be made in the figures making said item 1.79%.

The chief controversial question is over the adoption by the board of the mileage percentage in Wyoming as a proper factor in fixing valuation. There is no dispute over the figure itself, which is 3.29%, but the plaintiff contending that it is not a proper element of fixing value under the circumstances of the case at bar, although the records showed that the board used it as a determining factor. The computation of the board was arrived at by an addition of the traffic units at 1.58%, the use of the rolling stock at 1.65%, the average of the gross and net revenue at 1.89%, and the mileage percentage of 3.29%, making a total of 8.41%, which divided by four, representing the four factors, gives an average basis of 2.10%, thereby fixing the valuation adopted by the board at $7,881,003.04 (there is an apparent error of ten cents which may be disregarded).

It is undoubtedly true that the mileage percentage factor is a proper one under certain circumstances, as has repeatedly been announced by the Supreme Court. It is still recognized in cases where the conditions surrounding the tracks and facilities of a railroad are substantially the same in one state as in another. Where, therefore, these conditions are different as shown by the evidence, it would

seem that the high court has found against the adoption of the factor in the way of giving a fair equalization of value.

The distinction was brought to light in the case of Pittsburgh Railway Co. v. Backus, 154 U. S. 421, where Mr. Justice Brewer discussed the subject, but the case passed into an affirmance by a divided court, presumably upon [fol. 38] the theory that there was no evidence which justified the interference of a court of equity.

In Fargo v. Hart, 193 U. S. 490, Mr. Justice Holmes discusses the principal at page 499 and differentiates the cases of the Supreme Court. His language is as follows:

"The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce along the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. Western Union Telegraph Company v. Taggart, 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

"It is obvious however that this motion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true

meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in [fol. 39] one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense. Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus, 154 U. S. 421, 431; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 23. The same principle applies to personal property which the state would not have the right to tax directly. Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 227; S. C. 166 U. S. 185, 222, 223. In Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus, there was reason to suspect an infraction of constitutional rights, but the Secretary of State testified that there was no assessment of property outside the state, 154 U. S. 434, and therefore the court could not say that there was more than a possible overvaluation by the board. Of course if the board did not go beyond its jurisdiction its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the Express Companies' cases previously decided, it was pointed out that th-re was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account."

In that case the lower court was reversed, also by a divided court.

In Union Tank Line Co. v. Wright, 249 U. S. 275, the court clearly holds that the mileage percentage basis where the evidence showed that the line in one state was substantially different than it is elsewhere, amounted to an arbitrary method which produced results wholly unreasonable. At pages 282-283 the court says:

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process

clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according [fol. 40] to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western Union Telegraph Co. v. Massachusetts), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause of the Fourteenth Amendment or both. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Marge v. Baltimore & Ohio R. R. Co., 127 U. S. 117; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26; Adams Express Co. v. Ohio, 165 U. S. 194; s. c., 166 U. S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; Fargo v. Hart, 193 U. S. 490; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.

"In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation

amounted to $47,310—the challenged assessment specified $291,196.

[fol. 41] "We think plaintiff in error's property was appraised according to an arbitrary method which produced results unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

In Wallace v. Hines, 253 U. S. 66, Mr. Justice Holmes in again delivering the opinion of the court, discusses the element of mileage percentage at page 69 in the following language:

"As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

"The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state."

[fol. 42] Applying the principal of these cases to the case at bar, I am clearly of the opinion that the facts before the board and now before the court, are sufficient to justify the conclusion that the track mileage percentage was and is an impotent and erroneous factor in fixing the value of the plaintiff's property in the State of Wyoming, and its use by the board with the true facts before it amounted to an arbitrary and unreasonable method, transcending plaintiff's constitutional rights. It is true that it was only used by the State Board as one of the factors, yet if it were erroneous it is as potent in arriving at an improper figure of valuation as though it were used as the sole factor, differing in degree only when used with other factors in the overvaluation which it produces, as distinguished from a greater overvaluation which it would produce if used singly. The testimony in the case clearly shows that the differences of plaintiff's line in Wyoming as compared with its lines outside consists in its physical track, the distance between stations, the absence of expensive terminal facilities and the like, which all make for overvaluation in Wyoming when the mileage precentage factor is used. I shall not attempt to rehearse the evidence directed to this point, but content myself with the feeling that it is sufficient to justify the conclusion reached.

The remaining point in the case revolves around plaintiff's contention, that plaintiff's property has been consistently, continuously and intentionally valued upon a different and a higher basis than other property in the state, together with the claim that much taxable property in the state has been continuously and intentionally omitted from taxation lists. Evidence has been presented on behalf of the plaintiff tending to support its contention in this respect. When the proofs are analized, however, it must be admitted that so far as the agricultural and grazing land valuations are concerned, they generally represent the true and full value of such properties. In other classes of property, there are isolated instances in some of the counties through which plaintiff's line passes, where there may have been valuations for assessment at less than the true value. These proofs, however, in my opinion, do not reach the dignity of a continuous, studied and intentional undervaluation, nor is there any showing which justifies the conclusion that there was a studied attempt on the part of

the taxing officials to bring about a favorable result to one [fol. 43] class of taxpayers over another. As to the alleged failure on the part of the taxing officials to tax all property not exempt from taxation, the evidence tends to show that certain classes of property were not taxed, but this was not on account of officials desiring to omit the same from taxation but more on account of the fact that owing to the nature of the property it was impossible to secure sufficient evidence of its existence to justify its listing for taxation purposes. The statements in the reports to the State Board if relied upon by plaintiff in regard to the escape of property from taxation justifies only the conclusion, which nearly everyone knows, that it is practically impossible under the present system of taxation to effect the listing of all property. The evidence presented does not therefore justify the granting of relief to the plaintiff upon this ground, in the face of a fair showing that reasonable and honest effort was made to fairly and honestly tax property and to secure the return of all property for taxation which is legally taxable.

Recapitulating, the conclusions of the court are, that the plaintiff is entitled to relief upon the basis of the erroneous inclusion of the track mileage percentage as a factor in determining the valuation of plaintiff's property in Wyoming; that is, its use as a factor in the manner in which it was here used without making proper allowances for the difference in proportionate values as existing in Wyoming in comparison with the property of plaintiff in other states. In fact, it is rather apparent that the mileage percentage basis under the circumstances in the case at bar would not be adapted to any method of determining value unless it were possible to equalize this factor before being used. With this factor eliminated together with the correction as to the apparent error in computing the factor of operating income, we have the following result:

Traffic units	1.58
Rolling stock	1.65
Operating Revenues	1.79
Total	5.02

This total divided by three as the average of the three factors, gives a result of 1.673%, which as applied to the

total valuation of plaintiff's property of $375,285,902.00 makes a valuation for the State of Wyoming of $6,278,-[fol. 44] 534.14, or a reduction over the valuation used by the State Board and certified to the taxing units of the several counties of $1,602,468.90, which latter amount if the first reasoning be correct, represents a substantial overvaluation so as to entitle plaintiff to relief.

Inasmuch as it would seem to be the function of a court of equity to determine the entire matter before it with respect to securing equality as far as may be to the complaining taxpayer (Green v. Louis & Interurban, 244 U. S. 499), the finding of this court will be that the State Board of Equalization by adopting the mileage percentage as a factor in the determination of the value of plaintiff's property in Wyoming, used an erroneous, improper, unequal and arbitrary basis for its computation and that the value of said property by the use of all the legitimate factors which have been presented to the court, should be, as before stated, $6,278,534.14. Th- distribution of this amount in values among the several counties of which the defendants are the representatives as tax collectors, will be ratified and approved, the appropriate figures for which may be computed and caried into the decree. As to all taxes upon valuation exceeding the above amount, the defendants will be permanently restrained and enjoined from collecting the same, and as to all other taxes, the temporary injunction will be dissolved.

Findings, conclusion and a decree may be prepared through collaboration of counsel and submitted to the court on or before December 5, 1932, awarding costs to the plaintiff and reserving proper exceptions to the parties.

In United States District Court

Findings of Fact, Conclusions of Law and Decree—Filed Dec. 17, 1932

The above entitled cause came on to be heard and tried at the November, 1931, term of this court on the 21st day of March, 1932, and evidence having been submitted on behalf of complainant and on behalf of defendants, and plaintiff and defendants having rested, and briefs having been

filed, submitted and examined by the court, and said cause having been taken under advisement until this day, the court now makes the following findings of fact:

[fol. 45] FINDINGS OF FACT

1. Plaintiff is now and for many years last past has been a corporation organized and existing under and by virtue of the law, and a citizen, of the State of Illinois.

2. Defendants, Thomas C. Rowley, Charles T. Cole, Alta Pearl Massee, and D. A. Shoopman, are now, were at the time of the commencement of this case, and ever since have been, the duly elected, qualified and acting county treasurers, respectively, of the counties of Converse, Fremont, Natrona and Niobrara, in the State of Wyoming.

3. The amount involved in this cause, exclusive of costs and interest, exceeds the sum of $3,000.00 as to each of the defendants.

4. The Wyoming State Board of Equalization after protest and hearing by the plaintiff made its finding and order on or about the 14th day of July, 1931, whereby it placed a valuation for tax purposes upon the property of the plaintiff located in the State of Wyoming, and subject to valuation by the said State Board of Equalization of $7,881,-003.94.

5. Plaintiff owns and operates a railway system in the States of Illinois, Wisconsin, Minnesota, South Dakota, Iowa, Nebraska, Michigan, North Dakota and Wyoming, and has and operates as a part of its system property located in the counties of Niobrara, Converse, Natrona and Fremont, in the State of Wyoming, there being 8,180.20 miles of main line track in plaintiff's entire system, of which 278.35 miles is located in the State of Wyoming; and that the quantity, quality, cost and value of plaintiff's property located within the State of Wyoming, measured upon the basis of miles of main line track, is greatly less than throughout its system, which fact was well known to the State Board of Equalization when it placed the aforesaid valuation on plaintiff's property. To which finding defendants now and at the time duly excepted.

6. Of the 278.35 miles of plaintiff's main line track in Wyoming, 71.24 miles are in Converse County, 76.86 miles

are in Fremont County, 85.35 miles are in Natrona County, and 44.90 miles are in Niobrara County.

7. In arriving at the aforesaid valuation of $7,881,003.94, [fol. 46] as representing the value of plaintiff's property in the State of Wyoming, the said State Board of Equalization having determined the value of plaintiff's entire operating property, not including non-operating property locally assessed, to be $375,285,903.00, adopted and used as a factor the percentage of plaintiff's main line track located in the State of Wyoming, to-wit, 3.29%, without taking into account the fact that plaintiff's property in the State of Wyoming, measured on a mileage basis, is and was greatly less in quantity, quality, cost and value than the portion of its operating system located outside the State of Wyoming. To which finding defendants now and at the time duly excepted.

8. In arriving at the aforesaid value the State Board of Equalization used as a factor the average of the percentage of gross and net income of the plaintiff within the State of Wyoming, and in making its computations used the figure 1.89%, whereas the figure correctly representing the average percentage of the company's gross and net income within the state of Wyoming is 1.79%.

9. The evidence submitted by the plaintiff upon the question of discrimination is not sufficient to show that there was an intentional and systematic undervaluation of property generally throughout the State of Wyoming or throughout the aforesaid counties, or that there was any intentional omission from the tax rolls of a considerable amount of property. To which finding defendants now and at the time duly excepted, and to which finding the plaintiff now excepts and at the time excepted.

10. That the State Board of Equalization, previous to the commencement of this action, certified the aforesaid valuation of $7,881,003.94, to the County assessor of the aforesaid counties, and apportioned the same to the said counties as follows:

To Converse County	$2,017,039.00;
To Fremont County	$2,176,159.00;
To Natrona County	$2,416,339.00;
To Niobrara County	$1,271,267.00.

which said respective valuations were spread upon the assessment rolls of said respective counties, and by them certified to the defendant county treasurer for collection, upon [fol. 47] which valuations taxes were levied in said respective counties upon the property of the plaintiff located therein as follows:

In Converse County	$40,042.27;
In Fremont County	$48,223.02;
In Natrona County	$47,701.82;
In Niobrara County	$32,639.01.

the collection of which by distraint of plaintiff's property was threatened by said respective county collectors up to the time of the commencement of this action.

Conclusions of Law

Upon the aforesaid findings of fact the court makes the following conclusions of law:

1. Plaintiff has no adequate remedy at law. To which conclusions the defendants now and at the time duly excepted.

2. This court has jurisdiction of this cause on the equity side, and has jurisdiction to grant the equity relief prayed for in plaintiff's bill of complaint. To which conclusions the defendants now and at the time duly excepted.

3. That the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track, without taking into account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system, and the use of said percentage, as a factor in determining the value of plaintiff's property located in the State of Wyoming and subject to valuation by the said board, constituted and constitutes an arbitrary and unreasonable method, and the application of a wholly wrong method and principle of determining the value of plaintiff's property in the State of Wyoming. To which conclusion the defendants now and at the time duly excepted.

4. That the plaintiff's traffic units within the State of Wyoming are 1.58% of the whole; that its rolling stock used in the State of Wyoming is 1.65% of the whole; that its

operating revenue in the State of Wyoming is 1.79% of the whole; that the average of these three factors is 1.673%, which, applied to the total valuation of plaintiff's property [fol. 48] of $375,285,902, makes a valuation of plaintiff's operating property in the State of Wyoming and subject to valuation by said Board, of and amounting to $6,278,534.14, which the court finds to be the true actual value of plaintiff's said property in the State of Wyoming, and which is $1,602,468.90 less than the valuation placed on plaintiff's said property in the State of Wyoming by said State Board of Equalization; and that plaintiff's said property in the State of Wyoming was substantially and aribtrarily overvalued by the said State Board of Equalization. To which conclusions the defendants now and at the time duly excepted.

5. That the true actual value of plaintiff's said property in said respective counties in the year 1931 was as follows: Converse County, $1,606,908, Fremont County, $1,733,674, Natrona County, $1,925,177, and Niobrara County, $1,012,-776; that the total taxes legally assessable for said year upon the valuations aforesaid in the said respective counties are as follows: Converse County, $31,900.34, Fremont County, $38,417.71, Natrona County, $38,002.48, and Niobrara County, $26,002.40; that the amounts of taxes already paid by the plaintiff at the commencement of this suit in the said respective counties are as follows: Converse County, $24,025.36, Fremont County, $28,933.82, Natrona County, $28,621.09, and Niobrara County, $19,583.40; and that the amounts due to the said respective counties from the plaintiff for 1931 taxes upon the total valuation fixed by the court and allocated to the said respective counties are the following, and no more, to-wit: Converse County, $7,874.98, Fremont County, $9,483.89, Natrona County, $9,381.59, and Niobrara County, 6,419.00. To each of which findings and conclusions defendants now and at the time duly excepted.

Decree

It Is Therefore Considered, Ordered, Adjudged and Decreed by the Court that on or before the 31st day of December, 1932, the plaintiff pay to the Treasurer of Converse County the sum of $7,874.98, and to the Treasurer of Fremont County, the sum of $9,483.89, and to the Treasurer of

Niobrara County, the sum of $6,419.00, and to the Treasurer of Natrona County, the sum of $9,381.39, and that the defendants, and each of them, be, and they are hereby permanently enjoined from collecting or attempting to collect any sums as taxes for the year 1931 upon property of the [fol. 49] plaintiff valued by the State Board of Equalization excepting the sums last mentioned. To which decree and order of the court, and to each matter therein, the defendants now and at the time duly excepted.

It is further ordered, adjudged and decreed by the Court that each of the defendants pay to the plaintiff one-quarter of all plaintiff's costs herein, the same to be taxed by the clerk of this court. To which order and decree the defendants at the time duly excepted.

Done in Open Court this 17th day of December, 1932.

By the Court:

T. Blake Kennedy, Judge.

O. K. as to form:

George W. Ferguson, Asst. Atty. General. R. R. Rose, Atty. for Pltff.

IN UNITED STATES DISTRICT COURT

Statement of Evidence—Lodged with Clerk, March 13, 1933; Filed April 24, 1933

The following is appellants' condensed statement in narrative form of the evidence given upon the trial of said cause, made pursuant to Equity Rule Number 75 (b), and lodged in the clerk's office for examination by plaintiff, as provided by said rule.

Thereupon plaintiff's Exhibit A was introduced in evidence, being a copy of the order of the State Board of Equalization fixing the value of the property of plaintiff for taxation in the State of Wyoming for the year 1931. A copy of the same is as follows:

PLAINTIFF'S EXHIBIT "A"

Before the State Board of Equalization of Wyoming

In the Matter of the Valuation for Assessment Purposes of the Chicago & North Western Railway Company

Order

On the 9th day of July, 1931, the representatives of the Chicago & North Western Railway Company appeared before the State Board of Equalization in protest to the tentative value placed upon their property in the State of [fol. 50] Wyoming for taxation purposes for the year 1931, to wit: $7,989,587.00.

These representatives submitted, among other matters, statistical calculations for the purpose of proving that the property of this Railway in Wyoming should be assessed at not more than $5,849,570.00.

The method by which they arrived at this figure was as follows:

Taking the average of the five preceding years of the market value of their "stocks and bonds" for one factor and the average of the five preceding years of the "Net Corporate Income from Railway Operations Capitalized at 6% for the other factor in arriving at the value of the entire System,

the average of the first factor being		$385,800,085
the average of the second factor being		364,771,720
divided by 2	2)	750,571,805
giving a value for the System of		$375,285,902

The State Board of Equalization has no objection to accepting this amount as the reasonable value of their Railway Operating Property, but the State Board of Equalization objects to the method used by the Railway representatives in arriving at the allocation of a percentage of 1.56 of this total value for the State of Wyoming, the objections being based on the following grounds:

That the following factors as used by the Railway representatives namely the five-year averages of the "Traffic Units," "Operating Revenue" and use of "Rolling Stock" does not represent a fair way of arriving at the percentage that should be allocated to Wyoming.

To explain why these factors should not be used by themselves in arriving at a fair percentage it will be necessary to remember that the Chicago & North Western Railway has no Western outlet, hence is in reality a branch line whilst in Wyoming; therefore, to take "Traffic Units" and use of "Rolling Stock" as two of the three factors in deciding what percentage of the whole should be allocated to Wyoming is manifestly unfair to the State as this State derives no benefits from overhead traffic whilst contribut-
[fol. 51] ing its share of such traffic for the benefit of other states. "Operating Revenues" should be substituted by "Net Operating Revenues" if it is to be used as a factor for it is the "Net Operating Revenues" that help to make a success of any undertaking, whilst "Operating Revenues" might be totally offset by "Operating Expenses."

We might, with equal propriety, insist that the percentage to be allocated to Wyoming should be those only which were favorable to the State as to accept those only submitted by the Railway representatives which naturally are the ones that are favorable to that property owner.

Admitting that the financial conditions of the Railway are not as favorable as in the past, this condition is also true of many of the other taxpayers in the State and whatever influence this might have, in our wish to relieve the tax burden, one cannot lose sight of the fact that it is the duty of this Board, under the statutory requirement for valuations for taxation purposes, to equalize as nearly as possible, the tax burden according to the value of the amount of property each taxpayer has.

If we accept the factors "Traffic Units" and "Use of "Rolling Stock" we contend that we are entitled to the percentage of the mileage of the road to offset the unfavorable conditions governing these two factors in Wyoming in this particular instance.

We also find that instead of using the "Operating Revenues" as a factor that it should be the "Net Operating Revenues."

This gives us the following factors:

Traffic Units	1.58%
Use of Rolling Stock, as per evidence	1.65%
Net Operating Revenues	1.89%
Percentage of Miles of Railway in Wyoming	3.29%
Divided by 4	8.41%
Percentage to be allocated to Wyoming	2.10%

All percentages are based on a five-year average.

Five-year average of Value of Railway $375,285,902

$375,285,902×2.10%=$7,881,003.94.

$7,881,003.94—Equalized Wyoming portion of value for taxation purposes.

[fol. 52] Many other factors could with equal propriety be used which naturally would affect the final results by increasing the value but we have endeavored to follow the lines as suggested by the Railway representatives and use factors that might reasonably be deemed as directly bearing on the true value of the property.

Wherefore It Is Ordered, that the valuation of said property for taxation purposes for the year 1931 be and the same is fixed as of the value of $7,881,003.94.

Dated at Cheyenne, Wyoming, this 14th day of July, A. D. 1931.

State Board of Equalization, by F. Chatterton, Chairman; C. H. McWhinnie, Member; B. B. Morton, Member. (Seal.)

Attest:

W. J. Taylor, Secretary.

C. F. Balch, a witness on behalf of plaintiff, testified:

Direct examination.

I reside in Evanston, Illinois, I am employed by the Chicago and North Western Railway as its statistician in the office of the president. I have been so employed a little over eight years. Prior to that, I was Assistant General Auditor having charge of the revenue and car accounts for

three years. Prior to that, I had the title of statistician in the accounting department for ten years. I have been employed in the accounting work proper for about forty years. I was in the service of the Interstate Commerce Commission as an examiner of accounts from September, 1907 to August, 1910. I had a senior rank and credential No. 6; that is, I was sixth out of eighty-five men when I entered the service. As statistician of the plaintiff, I have access to all of the accounts of the company, and my peculiar duties are to make up such statistics and data as are necessary in our rate hearings and hearings of this character and in presenting the accounting data with reference to most of our legal and rate cases. Aside from that, I am at the service of the president for any statistical or special service that he requires. These statistics, which I have prepared in connection with the present hearings, have been gathered from the records of the company. [fol. 53] These records are throughout all of the accounting department offices and are stored in a large warehouse at Ravenwood. They could not be produced in court with any measure of convenience. The data I have involved probably several carloads of records.

The system value of the Chicago and North Western Railway Company was arrived at by taking the market value of the stocks and bonds, from that deducting the non-operating property, arriving at the market value of the railway property itself, as one method. As the other method, by taking the known railway operating income and capitalizing it at six (6) per cent, combining and getting the average of the two, then allocating this to the several states. These two methods are in common use by the North Western Railway Company. They are not used in Minnesota because they tax on a gross earning basis. The method I have mentioned for arriving at system value is used by the company in all of the nine states in which it operates. It has been so used for over ten years. It is used by other operating carriers. The market value of the entire line was arrived at by taking the high and the low quotations of each separate issue of securities for each of the twelve months of the year, adding them together and dividing by the number of quotations. Sometimes there are not sales in all of the twelve months. We may have twenty quotations in a year and have to average the twenty. Otherwise

it is an average of all of the quotations that are published and that are collected for each issue of securities and that average price over the time is used to extend and ascertain the value. The average value for the five-year period ending December, 1930, was $385,800,085—that represents the market value of the railway operating property only.

(Thereupon were introduced plaintiff's Exhibits B, B-1, B-2, B-3, B-4 and C, containing detailed enumeration of and statistics as to the value of plaintiff's stocks and bonds, together with its corporate assets not used in the operation of its railway, for the years, 1926, 1927, 1928, 1929 and 1930. From these exhibits, the witness testified as to their value.)

Based on the market value of plaintiff's stocks and bonds, its railway operating property, not including non-operating property locally assessed, was valued at $342,767,-[fol. 54] 737.00 for the year 1926; $398,490,108.00 for the year 1927; $397,772,006.00 for the year 1928; $398,555,-050.00 for the year 1929; and $391,415,526.00 for the year 1930.

(Thereupon was introduced plaintiff's Exhibit D, a statistical table itemizing the revenue and expenses of plaintiff in operating its railway showing its operating (gross) revenues for the year 1926 to be $154,335,724.00; 1927, $150,132,960.00; 1928, $152,089,755.00; 1929, $154,732,-947.00; 1930, $130,030,474.00;—Net Revenue from Railway Operations for the year 1926 to be $33,747,341.00; 1927, $33,138,693.00; 1928, $35,450,847.00; 1929, $39,446,907.00; 1930, $28,939,050.00;—Net Operating Income for the year 1926 to be $22,295,139.00; 1927, $20,257,694.00; 1928, $23,-225,683.00; 1929, $26,220,149.00; 1930, $17,432,851.00.)

By deducting tax accruals, uncollectible railway revenues, equipment and joint facility rents from the net operating revenue is obtained what is called the net railway operating income.

(Thereupon was introduced plaintiff's Exhibit E, showing the value of plaintiff's operating railway property based on its net railway operating income capitalized at six (6) per cent for a five-year period to be for the year 1926, $371,585,653; 1927, $337,628,225; 1928, $387,094,715;

1929, $437,002,491; 1930, $290,547,515;—and an average for the five years of $364,771,720.)

The average value of the stocks and bonds and the capitalized average income over a period of five years discloses the average value of the entire operating system of the Chicago and North Western Railway to be $375,285,903.00, which is the value taken by the State Board of Equalization with the exception that they dropped $1.00.

(Thereupon were introduced plaintiff's Exhibits F and F-1, F-2, F-3, F-4 and F-5, showing the percentage of traffic units, use of rolling stock and train miles of plaintiff in the states in which it operates, for a five-year period:

[fol. 55]

State	Traffic Units—Ratios 1930	1929	1928	1927	1926	Use of Rolling Stock—Ratios 1930	1929	1928	1927	1926
Ill	29.03%	29.19%	28.84%	28.00%	27.69%)	27.86%	28.14%	27.95%	27.12%	27.58%
Wis	25.81%	26.87%	26.90%	27.03%	27.96%)	24.06%	25.14%	24.65%	24.86%	25.16%
Mich	4.65%	5.56%	5.00%	5.35%	5.64%)	2.98%	3.33%	3.08%	3.21%	3.37%
Minn	3.79%	3.10%	3.26%	3.19%	2.84%)	3.88%	3.61%	3.74%	3.71%	3.70%
Iowa	24.84%	24.33%	24.33%	23.42%	23.59%)	27.23%	26.30%	26.59%	25.74%	25.21%
N. Dak.	.04%	.03%	.03%	.03%	.03%)	.04%	.03%	.04%	.04%	.04%
S. Dak	4.28%	3.71%	3.98%	4.00%	3.70%)	4.98%	4.71%	4.85%	5.01%	4.82%
Nebr.	6.14%	5.78%	6.13%	7.17%	6.85%)	7.43%	7.23%	7.52%	8.46%	8.39%
Wyo.	1.42%	1.43%	1.53%	1.81%	1.70%)	1.54	1.51%	1.58%	1.85%	1.73%

State	Railway Operating Revenue—Ratios 1930	1929	1928	1927	1926	State	Train Miles—Ratios 1930	1929	1928	1927	192
Ill	28.58%	28.77%	28.72%	28.14%	27.01%	Ill	25.28%	25.18%	24.93%	24.38%	24.78%
Wis	27.51%	28.95%	28.87%	29.27%	30.28%	Wis	25.25%	26.19%	26.17%	26.15%	26.05%
Mich	3.67%	4.14%	3.78%	3.99%	4.35%	Mich	2.85%	3.04%	2.91%	2.90%	3.08%
Minn	3.51%	3.08%	3.13%	3.23%	3.04%	Minn	4.72%	4.57%	4.65%	4.66%	4.65%
Iowa	22.66%	22.00%	21.81%	21.23%	21.22%	Iowa	25.17%	24.53%	24.18%	23.88%	23.69%
N. Dak.	.03%	.03%	.03%	.03%	.03%	N. Dak.	.06%	.05%	.05%	.06%	.05%
S. Dak.	4.79%	4.42%	4.62%	4.55%	4.57%	S. Dak.	6.98%	6.71%	6.97%	7.13%	6.75%
Nebr.	7.79%	7.21%	7.57%	8.04%	8.03%	Nebr.	8.30%	8.33%	8.65%	9.19%	9.35%
Wyo.	1.46%	1.40%	1.47%	1.52%	1.47%	Wyo.	1.39%	1.40%	1.49%	1.65%	1.60%

[fol. 56] Traffic units are arrived at by adding together the transportation of passengers for one mile per passenger plus the transportation of freight per miles tons. Operating revenue, is the gross revenue. Rolling stock represents the book value of all the cars and locomotives of plaintiff. These have been reported not only for the entire line but have been computed for each separate state served by the plaintiff. These three factors are based upon the use of the property in the different states as indicating value.

Traffic units represent the amount of passengers and the gross amount of freight in each state; that is to say, the units measured in passenger miles for passenger service. Railway property consists of a certain amount of fixed property, tracks, buildings, etc., which can be allocated in each state and then in addition to that, there is the rolling stock, passenger cars, freight cars, locomotives and work equipment which is constantly floating throughout all of the system wherever it operates. A record is kept of the number of miles that each locomotive, freight car and passenger car travels during the year. We compute the miles that each locomotive, freight car and passenger car travels in each state and from this information, we are able to allocate these costs.

My testimony has now covered all of the allocating factors that were used in the report made to the State Board of Equalization in the last five years. I have not used any other allocating factors. There are other allocating factors in determining or attempting to arrive at the value or percentage of value in a particular jurisdiction by other roads, or that have been used in the past. One of these is transportation train miles. Transportation train miles, the miles of all tracks and the miles of main track are the three factors which have more or less recognition, according to the circumstances and appropriateness among railroads.

Plaintiff has not used train miles as a factor. If it had used that factor, it would have lowered the value of its property in Wyoming. Transportation train mile is a train run one mile—whether it is passenger, freight, mixed or special service, regardless of the number of cars or character of the engine or the amount of freight or the revenue or the use of rolling stock.

The average of the three allocating factors used by the [fols. 57 & 58] plaintiff last year was 1.473, and the transportation train mile factor was 1.39.

The factor, transportation train miles, is not properly usable for the reason that train miles do not have uniform characteristics in the several states. A train does not have the same number of cars, does not transport the same number of tons, and the revenues are different. In other words, if a train consisting of an engine and a caboose is hauled one mile, that would be called a transportation train mile, and the train consisting of two engines and sixty freight cars, all loaded, transported one mile would make a train mile.

All the elements that enter into the transportation train mile have been taken into account in the use of the rolling stock factor and the traffic unit factor.

The factors used by plaintiff for allocating are the same in all states. A ton is a ton everywhere and a mile is a mile everywhere, and in the use of rolling stock, a car is a car everywhere, and an engine is the same, but in the use of a train mile, the characteristics are different in all of the different states and conspicuously so with reference to the size of the train.

The number of miles in the entire system of plaintiff for the year 1930 was 8,458.52, and the number of miles operated in Wyoming was 278.35, which is 3.29% of the system. The number of miles of track in Wyoming has not changed during the past five years.

The information contained on plaintiff's exhibit F was all furnished to the State Board of Equalization at the hearing in the summer of 1931, and the information contained in plaintiff's Exhibits F-2, F-3, F-4 and F-5 was also presented to the Board by the plaintiff at the same time.

(Thereupon was introduced plaintiff's Exhibit G, which follows in full.)

[fols. 59 & 60]

Plaintiff's Exhibit "G"

Chicago and North Western Railway Company

Assignment of Property Values to State of Wyoming

	Year	Value of entire line as represented by market values of stocks and bonds (1)	Assigned to State of Wyoming on basis of			
			Traffic units (2)	Operating revenues (3)	Use of rolling stock (4)	Average of 3 bases (5)
1	1926	$ 342,767,737	$ 5,827,052	$ 5,038,686	$ 5,929,882	$ 5,598,540
2	1927	398,490,108	7,212,671	6,057,050	7,372,067	6,880,596
3	1928	397,772,006	6,085,912	5,847,248	6,284,798	6,072,653
4	1929	398,555,050	5,699,337	5,579,771	6,018,181	5,765,763
5	1930	391,415,526	5,558,100	5,714,667	6,027,799	5,766,855
6	Aggregate	$1,929,000,427	$30,383,072	$28,237,422	$31,632,727	$30,084,407
7	Aver. 5 Yrs.	$ 385,800,085	$ 6,076,614	$ 5,647,484	$ 6,326,545	$ 6,016,881

	Year	Value of entire line as represented by income capitalized at 6%	Assigned to State of Wyoming on basis of			
			Traffic units	Operating revenues	Use of rolling stock	Average of 3 bases
8	1926	$ 371,585,653	$ 6,316,956	$ 5,462,309	$ 6,428,432	$ 6,069,232
9	1927	337,628,225	6,111,071	5,131,949	6,246,122	5,829,714
10	1928	387,094,715	5,922,549	5,690,293	6,116,096	5,009,646
11	1929	437,002,491	6,249,136	6,118,035	6,598,738	6,321,970
12	1930	290,547,517	4,125,775	4,241,994	4,474,432	4,280,734
13	Aggregate	$1,823,858,601	$28,725,487	$26,644,580	$29,863,820	$28,411,296
14	Aver. 5 Yrs.	$ 364,771,720	$ 5,745,097	$ 5,328,916	$ 5,972,764	$ 5,682,259
	Ratio used	Entire line	State of Wyoming			
15	1926	100.00%	1.70%	1.47%	1.73%	
16	1927	100.00%	1.81%	1.52%	1.85%	
17	1928	100.00%	1.53%	1.47%	1.58%	
18	1929	100.00%	1.43%	1.40%	1.51%	
19	1930	100.00%	1.42%	1.46%	1.54%	

		Miles of road	Per mile of road	
20	Average for 1930 only	278.35	$18,085	$ 5,023,795
21	Average for Five Years	278.35	$21,015	$ 5,849,570

[fol. 61] Exhibit G shows all of the figures used in making the computation of the entire line values to the State of Wyoming, both as to market value of stocks and bonds and as to the capitalized income. It is the application to the Wyoming property of the factors that I have testified to. Column 1 is the value of the railway operating property of the entire line as represented by the market value of the stocks and bonds for the years 1926 to 1930, inclusive, showing the average value for the five years to be $385,800,085.00. In columns 2, 3 and 4 appears the allocation to the State of Wyoming on three different bases for the year 1930. You will find on line 19 that the proportion of the traffic units in Wyoming is 1.42%. Applying this 1.42 to the amount, $391,415,526, we arrive at a value in Wyoming as shown on line 5, column 2, of $5,558,100. In the third column we have a computation arrived at by multiplying the 391 million plus by 1.46 the percentage of operating revenue in the State of Wyoming, as shown on line 19, which makes a value in Wyoming of $5,714,667.

The next column shows the value of the use of the rolling stock multiplying the 391 million by the percentage of 1.54, on line 19, giving the value in Wyoming of $6,027,799, as representing the value by rolling stock use in the state.

By adding the three together, columns 2, 3 and 4 and dividing by 3, I arrive at an average of these three allocations, which gives for the year 1930, $5,766,855.00.

Lines 1, 2, 3 and 4 give exactly the same information for the years as indicated. I arrive at the figures in line 7 by adding the five preceding amounts together and dividing by 5 which produces an average of the three allocations for the five years, or the average value of the system on a basis of stocks and bonds so that I have the value over a period of five years, allocated by the three factors I have described, as the sum of $6,016,881.

On the second section of this exhibit is an application of the same percentage to the net revenue operating income in the same way and gives the value of the property in Wyoming on that basis as $5,682,259, which is the value as reflected by the five year figures based upon capitalized income and by the use of the three allocating factors that I have described.

On line 20 is a combination for the year 1930—taking the [fol. 62] figure in line 5, in column 5, for Wyoming, and

adding to it the figure in line 12, column 5, and dividing by 2. In other words, that is the average by taking the Wyoming value upon the basis of stocks and bonds with the allocating factors and adding to the value of the Wyoming property arrived at by consideration of the capitalized income allocated by the allocating factors and dividing by 2, and you get the figure of $5,023,795, as representing the value of the property by both methods, and by all allocating factors for the year 1930. By doing the same thing for the five year period, I get $5,849,570, which represents the value of the property of the plaintiff in the State of Wyoming allocated by these methods applied to these two bases of system values. This value was claimed as 100% value by plaintiff in its report to the Board of Equalization for the year 1931, to be equalized.

(Thereupon was introduced plaintiff's Exhibit H-2 showing amount of property of entire line of plaintiff and proportion thereof in Wyoming on the basis of the I. C. C. appraisal, and which follows in full:

PLAINTIFF'S EXHIBIT H-2

Chicago and North Western Railway Company

Amount of Property of Entire Line and Proportion in Wyoming On Basis of I. C. C. Appraisal

Year	Amount of property as appraised by I. C. C. adjusted to December 31	Amount of property in Wyoming	Ratio of property in Wyoming to entire line
(1)	(2)	(3)	(4)
1926.....	$ 607,518,804	$11,533,381	1.91%
1927.....	626,279,174	11,975,638	1.84%
1928.....	637,440,049	11,745,635	1.80%
1929.....	658,298,388	11,859,983	1.80%
1930.....	669,198,216	11,724,126	1.75%
Total.....	$3,198,734,631	$58,838,763	1.84%
Average.....	$ 639,746,926	$11,767,752	1.84%

[fol. 63] This exhibit is to show the figures for the appraisal made by the Appraisal Bureau of the Interstate Commerce Commission of the property of the North Western Railway. The appraisal was based upon cost, not value.

The figures in Column No. 2 were arrived at by taking the appraisal of the Interstate Commerce Commission made June 30, 1917, at which time they fixed a final value of the property of the C. & N. W. Railway, and adding to it the net additions to the property for each year since that appraisal was arrived at. The figures are adjusted to December 31st and show the amount of property of the company at the end of 1930 to be $669,198,216.00 and the amount of property in Wyoming to be $11,724,126.00. In other words, 1.75% of the company's property is located in Wyoming. The exhibit shows that the average amount of company property throughout the system for the years 1926 to 1930 is $639,746,926.00; that the average amount of property in Wyoming for those years is $11,767,752.00, and that 1.84% of the company property based on the I. C. C. appraisal for an average of the five years was located in Wyoming."

(Thereupon was introduced plaintiff's Exhibit H-4, which follows in full.)

PLAINTIFF'S EXHIBIT "H-4"

"Chicago and North Western Railway Company

Value of Entire Line as adopted by Wyoming Board of Equalization	$375,285,902.00
Portion of same located in Wyoming as computed by I. C. C. plus additions to December 31, 1930 (5 year average)	1.84%
Value of Taxable Property in Wyoming as so determined	6,905,260.00
Value Claimed by C. &. N. W. Ry. Co. (5 Year average)	5,849,570.00
Property on I. C. C. basis exceeds that Computed by C. & N. W. Ry. By	1,055,690.00
Amount of Assessment	7,881,003.94
Wyoming Assessment exceeds Value on I. C. C. basis by	975,743.94"

By using the average percentage which the appraisal by the I. C. C. shows, 1.84%, it is shown that the Wyoming assessment exceeds the value on I. C. C. basis by $975,-743.94.

[fol. 64] (Thereupon was introduced plaintiff's Exhibit I.)

Exhibit I is a statement showing what we class as statistics of operation per mile of road in each of the different states served by the Chicago and North Western Railway. It shows the earnings per mile of road in each state, the traffic density of freight traffic measured by the tons one mile in each state, the passenger density measured by the passengers one mile in each state, and the two combined, and then the amount of rolling stock per mile of road. This exhibit relates entirely to the year 1930. The operating revenue in Illinois for 1930 was $44,932 per mile; in Wisconsin it was $16,498; in Wyoming it was $6,844. The average of the entire line was $15,373 per mile in the year 1930. The average for all of the states excepting Wyoming was $15,663. The earnings per mile in Wyoming were 44.52% of the average earnings per mile of the entire line. In other words, a mile of road in Wyoming earned 44.52% of the average mile of road throughout the system. It required 2¼ miles of road in Wyoming to earn as much as one average mile of the entire system. It required 2.29 miles of road in Wyoming to earn as much as one mile of road in the other eight states, based upon operating revenue valuations.

By the same computation, on the basis of freight traffic units, which is called freight traffic density, the average throughout the system was 895,012 tons one mile per mile of road. In Wyoming the average was 420,687, and for the entire system, excluding Wyoming, it was 911,152. Every mile of road in Wyoming handled 48.12% as much traffic as the average mile of the system. It required 2.13 miles of road in Wyoming to handle as much traffic as the average mile of the entire system. It required 2.17 miles of road in Wyoming to handle as much freight traffic as the average of the other eight states.

The average passenger units throughout the system for that year was 98,411. In Wyoming the average was 6,673. The average for the whole road, excluding Wyoming, was 101,532. The average mile of road in Wyoming carried 6.77% of the average amount of passenger traffic, as averaged for the entire line. It required 14.75 miles of road in Wyoming to carry as many passengers one mile as were carried by the average mile of road of the plaintiff. It re-

[fol. 65] quired 15.22 miles of road in Wyoming to carry the same number of passengers per mile as were carried per mile in all of the other eight states.

The average of the combined freight and passenger traffic units per mile was 993,423 and in Wyoming the average was 427,360. The average for the entire system, excluding Wyoming, was 1,012,684. The percentage of the combined average for Wyoming was 43.02%. It required 2.325 miles of road in Wyoming to handle as many traffic units as the average mile of road of the entire line of plaintiff.

The average of rolling stock use for the entire line per mile of road was 15,107. The average for Wyoming was 7,060. The average for the eight states other than Wyoming, was 15,380. The rolling stock per mile of road used in Wyoming was 46.73% of that of the whole system. There was the same amount of rolling stock used on 2.14 miles of road in Wyoming as on the average mile of the system. There was as much rolling stock used on 2.18 miles or road in Wyoming as on the average mile of road in the other eight states.

(Thereupon was introduced plaintiff's Exhibit J-1 which follows in full).

PLAINTIFF'S EXHIBIT "J-1"

Chicago and North Western Railway Company

Value of Railway Operating Property in Wyoming

On basis of $375,285,902 as computed by the State of Wyoming as the value of the Entire Line and apportioned to the State on basis of miles of Road

Entire Line

Value of Entire Line	$375,285,902
Miles of Road Operated 8,458.55.	
Average Value per Mile of Road (Entire Line)	44,368

State of Wyoming on Basis of 1930 Only

The miles of Road in Wyoming collectively are worth, per Mile:

(a) 44.52% of average on basis of Operating Revenue	19,753
(b) 43.02% of average on basis of Traffic Units	19,087
(c) 46.73% of average on basis of Rolling Stock	20,733
[fol. 66] (d) Sum of (a), (b) and (c)	59,573
(e) Average of Three, representing the value per mile of Road in Wyoming, properly computed	$19,858

Aggregate Value in Wyoming

On bases of assignment to State $19,858 x 278.35 miles	$5,527,474

Statistician, December 24, 1931.

On Exhibit J-1, I have computed the value in Wyoming by taking the miles of road in Wyoming and giving consideration to the characteristics of a mile of road in Wyoming, as shown on Exhibit I, which exhibit was for the year 1930. This exhibit shows that a mile of road in Wyoming, based on operating revenue, was worth $19,753; based on traffic units was worth $19,087; based on rolling stock was worth $20,733; an average of $19,858, and a total of $5,527,474.

The use of the rolling stock factor produces a higher value than three of the other factors used throughout these figures.

(Thereupon was introduced plaintiff's Exhibit J-3, showing the same data as Exhibit J-1 on a five year basis for the State of Wyoming ending December 31, 1930. The average for the entire line per mile as shown by the exhibit is $44,368.00. For Wyoming, based on operating revenue per mile the value is shown to be $21,306.00; based on traffic units the value is shown to be $19,691.00; based on rolling stock the value is shown to be $22,073.00. The average of the three factors shows the value of the company's property in Wyoming to be $21,024.00 per mile or an aggregate value of the company's property in Wyoming amounting to $5,852,030.00.)

(Thereupon was introduced plaintiff's Exhibit K).

Exhibit K deals with the transportation train miles. It is a comparison of the ratios in the State of Wyoming used by me in making up the exhibits which were presented to the Board at the hearing in 1931 showing for the five years (1926-1930) the different percentage ratios in Wyoming and the average of the three (factors used by the company in determining the value of its property in Wyoming) as compared with the percentage relation of the transportation train miles. The comparison shows that while the average traffic units in Wyoming for the five years is [fol. 67] 1.58%, the average transportation train miles for the same period is 1.51%, and that while the traffic units in 1930 in Wyoming was 1.42%, the transportation train miles in that year were only 1.39%. The average operating revenues in Wyoming for the five year period was 1.46% and the average transportation train miles was 151%. The use of rolling stock for the five year period was 1.64% as compared with 1.51% for transportation train miles. The average of the three factors used is 1.56% as compared with 1.51% representing transportation train miles.

(Thereupon was introduced plaintiff's Exhibit K-3, being a chart showing the operating revenue per mile of road of plaintiff.)

Exhibit K-3 shows the states traversed by the Chicago and North Western Railway, the miles of road operated in each state, railway operating income in each state, and the operating income per mile of road for the year 1930.

The three states of Minnesota, North Dakota and South Dakota showed a net operating income loss for 1930. The fact that there were three states, and that they may be at any time others, where there is a net operating income loss, practically prohibits its use as an allocating factor for the reason that to use net operating income here as a factor would determine that the road's property in the three states of South Dakota, North Dakota and Minnesota was worth less than nothing, and there is a great inequality between the states with the net per mile of road varying from $7,586 in Illinois, down to a loss of $1,876 in North Dakota, as compared with the average for the entire line of $2,061. There is no uniformity in this as a unit of measure. On the other hand, gross operating revenue represents the use of the property, whereas the net

operating revenue would indicate there was no use made of the property in those three states.

The value per mile of plaintiff's road was fixed in Wyoming for the year 1931 at $28,313, and for the year 1930 was fixed at $28,636 per mile of road. I think the average for the last five years was $28,678 per mile.

(Thereupon was introduced plaintiff's Exhibit L, which is as follows:)

[fol. 68]

PLAINTIFF'S EXHIBIT "L"

Chicago and North Western Railway Company

Statement of Ratios of Performance Units and Units of Property in Each State to the Entire Line for the Year Ended December 31st, 1930

	Wis.	Ill.	Mich.	Minn.	Iowa	N. D.	S. D.	Nebr.	Wyo.
Traffic Units....	25.81%	29.03%	4.65%	3.79%	24.84%	.04%	4.28%	6.14%	1.42%
Operating Revenue.....	27.51%	28.58%	3.67%	3.51%	22.66%	.03%	4.79%	7.79%	1.46%
Use of Rolling Stock.....	24.06%	27.86%	2.98%	3.88%	27.23%	.04%	4.98%	7.43%	1.54%
Transportation Train Miles...	25.28%	25.25%	2.85%	4.72%	25.17%	.06%	6.98%	8.30%	1.39%
Miles of Road Operated.....	25.63%	9.78%	6.17%	7.69%	19.31%	.17%	14.96%	13.00%	3.29%
Miles of all Tracks	26.98%	16.84%	7.74%	6.06%	18.73%	.12%	10.76%	9.97%	2.80%

[fol. 69] Exhibit L is a statement of the ratios of performance units and units of property in each state, giving the percentage of each state to the entire line, for performance units, for traffic units, operating revenues, use of rolling stock, transportation train miles, miles of roads operated and miles of all tracks. The ratio of the traffic units in Illinois with those of the entire system is 29,03%. That is, 29.03% of all traffic carried by the North Western Railway was carried in the State of Illinois in the year 1930. 1.42% of the entire traffic units of the system was carried in Wyoming.

(The percentage of the miles of road operated in Illinois was 9.78% of the entire system. In Wyoming the percentage operated is 3.29% of the entire system. For the other states the percentages are: Wisconsin, 25.63%; Michigan, 6.17%; Minnesota, 7.69%; Iowa, 19.31%; North Dakota, .17%; South Dakota, 14.96%; Nebraska, 13%. Miles of all tracks for the different states are: Wyoming, 2.8%; Wisconsin, 26.98%; Illinois, 16.84%; Michigan, 7.74%; Minnesota, 6.06%; Iowa, 1873%; North Dakota, .12%; South Dakota, 10.76%; Nebraska, 9.97%, as shown by Exhibit L.)

(Thereupon were introduced plaintiff's Exhibits M-1, M-2, M-3, M-4 and M-6.)

Exhibits M-1 and M-2 show the tons of freight traffic originating and received from other carriers and the total carried in the State of Wyoming classified as to commodities. The total tons of all freight originating in Wyoming was 844,813 tons, and the total tons of freight received from connecting carriers was 106,840 tons from connecting lines; the total for both being 951,653 tons. This 106,840 tons includes all freight received from connecting lines as well as from other divisions of the railroad. 105,762 tons of freight terminated in Wyoming.

Exhibit M-6 shows the total freight originating on the entire line in the year 1930 was 31,286,328, which is approximately 65% of the total tonnage carried. The other 35% of the freight carried in 1930 was received from connecting carriers. (Exh. M-6 is as follows:) (See following page (18a) for Exhibit M-6.)

[fol. 70] PLAINTIFF'S EXHIBIT "M-6"

Chicago and North Western Railway Company

Freight Traffic Statistics

Year 1930

(1)	Originating on line (2)	Received from connecting carriers (3)	Total tons carried (4)
Entire line:			
Tons carried	31,286,328	17,328,070	48,614,398
Miles operated	8,458.52	8,458.52	8,458.52
Tons carried per mile of road	3,699	2,049	5,748
State of Wyoming:			
Tons carried	844,813	106,840	951,653
Miles operated	278.35	278.35	278.35
Tons carried per mile of road	3,035	384	3,419
All states except Wyoming:			
Tons carried	30,441,515	17,221,230	47,662,745
Miles operated	8,180.17	8,180.17	8,180.17
Tons carried per mile of road	3,721	2,105	5,826
Tonnage of 278.35 average miles	1,029,617	570,339	1,599,956
Amount that Wyoming falls short of above average	184,804	463,499	648,303
Per cent of shortage	17.95%	81.27%	40.52%
Tonnage of 278.35 miles in states other than Wyoming	1,035,740	585,927	1,621,667
Amount that Wyoming falls short of above average	190,927	479,087	670,014
Per cent of shortage	18.43%	81.77%	41.32%

[fol. 71] Without figuring it, I would say that the freight originating in Wyoming is approximately 88% of that carried in the state, the other 12% would be that received from connecting carriers and other divisions. The base figures are shown on Exhibit M-2 for the year 1930. Exhibits M-3 and M-4 show the same information for the year 1929. Exhibit M-6 is a comparison between Wyoming and the entire line for the year 1930. It shows the tons carried for the entire line, as originating on the entire line, and the miles of road operated, and the average tons carried per mile, which is 3,699. The State of Wyoming originated 844,813 tons which were 3,035 tons per mile of road operated, and in all of the states, excluding Wyoming, the exhibit shows that the tons per mile originated were 3,721 tons per mile. There originated in Wyoming 184,804 tons less than the average amount of freight tonnage of the entire system. As compared with Wyoming, freight originating in the other states exceeded that in Wyoming 18.43% for the entire line. Freight received from connecting carriers average per mile 2,049 tons. In Wyoming, the average so received was 384 tons per mile. In all states except Wyoming, the average was 2,105 tons per mile. The tonnage thus received in Wyoming was 81.27% below the average of the entire system and 81.77% below the average for the other eight states. The average for the system of all tons carried was 5,748 tons per mile. In Wyoming, the average was 3,419 tons per mile; excluding Wyoming, the average was 5,826 tons per mile. Wyoming fell short 40.52% of the average for the system and short 41.32% of the average for the other eight states.

All the tonnage carried falls into two classes, either originating or received from connecting carriers. Originating freight in Wyoming falls short of the average per mile originating throughout the system 17.95%.

The haul of empties enters into the value of the railway of plaintiff. The company keeps an accurate record of the amount of empties hauled in proportion to the amount of loaded cars hauled of all classes of freight.

Exhibit M-2 shows that out of 844,813 tons of freight originating in Wyoming, there were about 675,000 tons of petroleum and lubricating oils and petroleum products, which would be about 80%. Also there are 27,000 tons of live stock and products of animals. Petroleum products, as I

[fol. 72] understand here, almost invariably are carried in tank cars. Tank cars must handle similar fluid products and not miscellaneous freight. In the handling of both live stock and products moving in tank cars, there is practically a mile empty for every loaded mile that the car travels. There are no return products for which the cars can be utilized. The carriers receive no revenue from the back haul of the empties either tank cars or live stock cars.

I have figures showing the percentage of back haul of empties throughout the system to the loaded haul to be 63.38% for the year 1930, which means that for every loaded car hauled 100 miles, an empty car would be hauled 63.38 miles. Confined entirely to Wyoming, the percentage of back haul of empties is 85.74%.

(Thereupon was introduced plaintiff's Exhibit P-1.)

Exhibit P-1 indicates a tremendous decline in the net railway operating income of the Chicago and North Western Railway during the past two years throughout the system. In the year 1930 the net railway operating income was 66.49% of that of 1929 and in 1931 it was 23.92% of that received for 1929. In 1931 the total net operating income of the company throughout the system was $6,272,136. The fixed interest and funded debt charges for that year were $16,178,907.

(Thereupon was introduced plaintiff's Exhibit Q-1.)

Exhibit Q-1 shows the loss of market values in the securities of the plaintiff during the year 1931, computed from the high quotations of January to the low quotations of November. This exhibit was made up in the month of December and shows a market loss of these stocks and bonds, marketable securities, to be $197,757,159.

(Thereupon were introduced plaintiff's Exhibits R-1, R-3, R-5, R-7, R-9, R-11, R-13, R-15, R-17, and R-18.)

Exhibit R-1 is a statement of the appraisal of the railroad property of plaintiff by the Interstate Commerce Commission under the act of 1913 based on cost as of the date of June 30, 1917, plus the net additions to December 31, 1930. Net additions are the expenditures that have been made upon the property since June 30, 1917, less the retirements, that is, net additions. The appraisal of the entire system of

plaintiff on December 31, 1930, was $669,198,216. For that [fol. 73] portion of the property in Wyoming, the appraisal was $11,724,126, which included an appropriate allocation of the equipment to that date. The percentage of the property in Wyoming to that of the entire system was 1.75%, which included all kinds of railroad property, fixed and rolling stock.

This appraised value per mile of the Wyoming property was $42,120, as compared with $79,813 for the entire line or a percentage for Wyoming of 52.77%. 52.77% of 3.29%, the latter representing the percentage or distance of main line track in Wyoming to the whole system, is 1.736%. The total appraisal of the property of plaintiff as of December 31, 1930, does not take into consideration deductions for depreciation on either the value fixed as of June 30, 1917, nor on the additions thereto.

Exhibit R-3 shows the appraisal of the property by the Interstate Commerce Commission as of June 30, 1917, for the entire line of plaintiff classified as to land, engineering and grading, bridges and tunnels, track structures, fences and road crossings and signs, signals and interlockers, and other fixed property, the total amount being $416,946,828. By adding to this the equipment and amount allowed for materials and supplies, the total is $501,658,211. For Wyoming, the total of fixed property is $6,350,551, and including equipment, materials and supplies, the total for Wyoming is $7,242,363. If the percentage of miles in Wyoming to the entire line of the plaintiff, that is, 3.29%, were used it would indicate the total fixed property for Wyoming to be $13,717,551.00, and by adding equipment, material and supplies thereto, the total for Wyoming would be indicated to be $16,504,555.00, which is $9,262,192.00 more than the actual I. C. C. appraisal of the company's Wyoming property.

Exhibit R-5 shows the appraised value of the Interstate Commerce Commission as of June 30, 1917, of the average mile of the road of plaintiff in Wyoming was $26,019, which was 43.19% of that of the system.

Exhibit R-7 was made up exactly the same as Exhibit R-3, taking into consideration the net additions from June 30, 1917, to December 31, 1930, which gives the same appraised value in total as shown by Exhibit R-1 as to the system and as to Wyoming. It shows that by allocating

[fol. 74] 3.29% of the total to Wyoming, there would be an excess over the I. C. C. appraisal for Wyoming in the sum of $10,292,495.

Exhibit R-9 shows the valuation fixed by the appraisal of the I. C. C. as of December 31, 1930, for the State of Wyoming to be 52.77% per mile of that of the entire system.

Exhibit R-11 is a chart comparing the value of the railroad operating property of plaintiff based on market value of stocks and bonds and net railway operating income capitalized at 6% with the I. C. C. appraisals for the years 1926, 1927, 1928, 1929 and 1930. The percentage of the average valuation for the five-year period, as based on the market value of stocks and bonds and net railway operating income capitalized at 6% to that of the I. C. C. appraisal, is 60.3%.

Exhibit R-13 is a chart comparing for each state the value of plaintiff's operating railroad property based on market value of stocks and bonds and net operating income capitalized at 6% with that of the I. C. C. appraisal adjusted to December 31, 1930; that for the State of Wyoming being $6,574,882, or 56.08% of the I. C. C. total appraisal.

. Exhibit R-15 is something of a test, really a reflection of real values in this appraisement, and to make this test, I have taken the operating revenue per mile of road for each of the nine states. Then I have taken the amount of property on the basis of the Interstate Commerce Commission appraisal, as shown in Exhibit R-1, all for the year 1930. The amount of operating revenue in Wyoming per mile was $6,884. The average system operating revenue per mile of road was $15,373. As shown by the I. C. C. appraisal, it required $42,120 of property to earn $6,884, or $6.15 worth of property to earn $1.00 of revenue in Wyoming. On the whole system, it took $5.19 in property as appraised to earn $1.00 of revenue. It required in Wyoming 1.18 worth of property to earn as much as a dollar's worth of property earns on the average on the entire line.

Exhibit R-17 has the same information taking the entire line with the State of Wyoming only, for a five-year period. It shows a percentage relation of the amount of property required to earn a dollar in Wyoming as compared with the entire line. That is to say, it takes 125% as much property, as appraised by the Interstate Commerce Commission, to

[fol. 75] earn a dollar, as it does for the entire line of the North Western Railway.

Exhibit R-18 shows computations involving that percentage of 125. The proportion of property in Wyoming, on the basis of the I. C. C. appraisal, we found to be 1.84% over a period of five years, and in considering that percentage, it should be remembered that that assumes every dollar's worth of property to have equal value with every other dollar's worth of property of the entire system, and in order to test the value, measured by dollars, I have set up the exhibit just described, showing that it takes 125% as much property in Wyoming as on the line generally, so this should be taken into consideration, in considering the percentage of 1.84, and dividing that by 125, to find out what 100% relation is, and we find that the correct proportion of value in Wyoming, based upon its earning power only, as compared with the entire line, would be 1.84 divided by 125, which equals 1.472%. That is to say that the real value of the property in Wyoming taken on the basis of the I. C. C. appraisal and considering this question of how much it takes to earn a dollar, the real value of the entire line so determined in Wyoming would be 1.47% of the entire line.

The combination of our three factors for the five years was 1.56 and this gives us 1.472 as the practical valuation of the appraisal of the I. C. C. By using this percentage as the allocating factor, the valuation of the Wyoming property would be a less amount than that by using a combination of the three allocating factors for which the plaintiff contends.

(Thereupon was introduced plaintiff's Exhibit V being a copy of a typewritten statement of about eight pages setting forth a description of the physical characteristics of plaintiff's railroad operating properties and their values as prepared by plaintiff and submitted to the State Board of Equalization of the State of Wyoming on June 29, 1928. And thereupon was introduced plaintiff's Exhibit V-1, being a similar document, but revised as of January 1, 1929, and presented to the State Board of Equalization at the hearing on July 12, 1930.)

(The information contained in Exhibits V and V-1 being a comparison of the properties of the company in Wyoming with those in the other states throughout its system is sub-

stantially the same as given in the testimony of Mr. Lorch appearing elsewhere in this record.)

[fol. 76] Thereupon plaintiff introduced in evidence plaintiff's Exhibit Y, which is a transcript of the proceedings had before the State Board of Equalization in July, 1931, and of evidence submitted by the plaintiff at that time in objection to the valuation theretofore tentatively fixed by the Board. The substance of the pertinent points in Exhibit Y is as follows:

Plaintiff's Tax Commissioner, R. E. Miller, explained to the Board the method by which the company arrived at the value of its railroad operating system by capitalizing its income at six per cent and by use of the market value of its stocks and bonds both over a period of five years, and of allocating to the State of Wyoming the portion of its property in that state, by use of traffic units, use of rolling stock and operating revenue. Mr. Miller stated that the valuation reached by the Board exceeded the actual value of the property in Wyoming to the extent of $1,972,706, and that the gross operating revenue of the system in 1930 was 15.96% less than in 1929, and in Wyoming it was 12.01% less than in 1929; that the railway operating expenses throughout the system in 1930 were 12.31% less than in 1929, and in Wyoming they were 9.85% less, and that the net railway operating income in 1930 decreased 90.55% over 1929 throughout the system, and showed a deficit of $150,167 in Wyoming.

Mr. Balch testified before the Board, explaining the use of capitalized income and market value of stocks and bonds to arrive at the system value of the railroad operating property and the use of the allocating factors of traffic units, use of rolling stock and operating revenue, and stated the value of the company's property in Wyoming to be not more than $5,847,570. Plaintiff's Exhibit Y contains several tabulations or exhibits which were explained and called to the attention of the Board. One of these exhibits is an exact duplicate of plaintiff's Exhibit G, appearing at Pages 9-10 of the statement of evidence. Another exhibit contained the information appearing on Pages 5 and 6 of the statement of evidence, showing the market value of railroad operating property less the value of non-operating property locally assessed as therein set out. Another exhibit presented to the Board was an exact duplicate of plaintiff's Exhibit B-4, referred to on Pages 5 and 5 of the state-

ment of evidence. Another exhibit presented to the Board was an exact duplicate of plaintiff's Exhibit C, referred to on Pages 5 and 6 of the statement of evidence, showing [fol. 77] the system value of the property after deducting the value of properties locally assessed to be as therein set out. Another exhibit called to the attention of the Board at the hearing was a duplicate of plaintiff's Exhibit F referred to on Pages 6 and 7 of the statement of evidence and containing a tabulation of the traffic units in each state and the ratio thereof, the railway operating revenues in each state and the ratio thereof, and the use of rolling stock in each state and the ratio thereof, for the year 1930, the ratios in Wyoming being as follows: Traffic units, 1.42%, railway operating revenue, 1.46%, and use of rolling stock, 1.54%.

Still another exhibit presented to the Board showed the operating revenue per mile of road in each state for the year 1930, the ton one mile revenue freight, the passenger one mile, all as per miles of road, and also the ton miles revenue freight, passenger miles freight revenue, and passenger service train revenue, all on a train mile basis. The operating revenue in Wyoming per mile of road was shown to be $6,844 per mile as compared with $15,373 on the average system mile; ton mile revenue freight was shown to be $420,687 as compared with the system average of $895,012. The passengers one mile in Wyoming were shown to be $6,673 as compared with the system average mile of $98,411. The ton miles revenue freight on the train mile basis were shown to be 439.11 in Wyoming as compared with the system mile of 494.82. The revenue passenger miles in Wyoming on the same basis were shown to be 9.71 as compared with 47.34 throughout the system. The freight revenue on the same basis was shown to be $6.62 in Wyoming as compared with the average system mile of $6.27, and the passenger service train revenue on the same basis was shown in Wyoming to be $.63 compared with the average system mile of $1.61.

There was also an exhibit introduced before the Board showing a comparison of the first five months' periods in the years 1925 to 1931, both inclusive. The gross operating revenues for the five months periods decreased from $55,165,477 in 1925 to $42,982,580 in 1931. The net railway operating income for the five months period decreased

from $4,659,979 in 1925 to $2,123,088 in 1931. The net income for the five months period decreased from $690,077 in 1925 and $2,669,940 in 1926 to $399,822 in 1930, and a deficit of $2,920,700 in 1931.

In connection with plaintiff's Exhibit Y and at the time [fol. 78] same was presented to the State Board of Equalization on July 8th, 1931, with reference to the taxation of plaintiff's property in Wyoming, the State Board of Equalization, speaking through Mr. McWhinnie, a member of the Board, advised the plaintiff in substance as follows:

"I do not agree with the Balch theory at all. It is al- right as far as it goes, only it leaves out half a dozen items that ought to be considered. For instance, your operating ratio is lower in Wyoming than on the whole system. Wyoming does not get credit for that. If the operating ratio on the whole system was the same as in Wyoming, you would be saving millions. You would not be in the red here. Your excuse is, you say, that you haven't got the big terminals, and all of the rest of it; but that is the final result, an investment is dependent after all on the net result, and that is the net revenue. Wyoming ought to be given credit since it is virtually a branch line, for a certain part of that overhead that we create on traffic that originates in Wyoming. Most of plaintiff's hauls out of Wyoming are long hauls and create large mileage.

"Now, if a carload of wool, or stock, or oil, it does not matter what it is, is loaded at Casper, the State of Wyoming gets credit for the 150 miles in Wyoming, and Nebraska gets the credit of all the rest. Now, there is no counter-balance in effect for that. We do not get anything except what is coming to Wyoming. There is no other balance of traffic to offset what Wyoming gives the other states. You should give each state credit, a mileage credit, for what it originates, according to the mileage that it travels in other states; and if you did that, you would find that the ratio would be quite different. It would be quite enough to alter the ratio entirely. These two questions are enough to alter the ratio that you are contending Wyoming is entitled to.

"There are other minor things. The fact that that says there that the operating ratio is so much smaller. Now, Mr. Miller taxed Wyoming with the proportion of the bonds

and stocks, or, rather, allocated to Wyoming a charge of interest on bonds and stocks. If we capitalize that, you, yourselves, value this road in Wyoming at close to twelve million dollars. It shows that you yourselves must be valuing it at that proportion of the whole system. And if you take the ratio of that, leaving out the question of charging [fol. 79] it up to us—that much interest, but taking the ratio that that interest is to all of your indebtedness on bonds and stocks, we get another ratio again.

"I have given you three figures that would affect the ratio. Mr. Balch suggested three methods of arriving at the valuation or ratio, and I suggested three that altered those ratios; but I think I can go through it thoroughly and show you some others, too. I have tried to reconcile the figures that were arrived at by adopting your stock and bond valuation and allocating the ratio to Wyoming to see that it balanced more or less with the valuation that was put on it by Wyoming. By adopting all of these different things, I found out that they were not so very far off. Now, of course, the condition today, we are perfectly willing to make certain allowances that you are not doing as well as you were; but I do not think that, if you are going to adopt a formula to base the value of your road here on, or that portion of it, I think it ought to take in everything and not just pick out one or two things and say, 'that is the ratio that should be applied to find out what each section of it is worth.'

"I am telling you how I have arrived at the value, and I have tried to be fair too."

Cross-examination:

I have been employed by the plaintiff a little over twenty years in my present capacity, but I was employed by it from 1885 to 1903 previous to that. Not in my present position but in the same character of work, statistician. I am not an auditor of the company. My name will be found in the official guide. I am not president nor secretary nor an administrative officer of the company. I am not its principal accounting officer. I am not familiar with valuations of railroad properties generally—just of our own system. I am familiar with the printed matter in published decisions of the Commission and their methods and so on. It

is a matter of public information. I have not made a study of any other systems with relation to their tax values and actual values as I have with our own system. I am not familiar with the actual values of the operating properties of the Burlington and Union Pacific Railroads in Wyoming. I do not profess to know anything about the relation of the taxable value to the actual value of either of [fol. 80] those systems in the State of Wyoming.

In the exhibits to which I have testified and which have been offered in evidence as plaintiff's Exhibits B to R-18, inclusive, I have not used, as a factor in determining the value of plaintiff's operating property in Wyoming, the net operating revenue of the system. I have used gross operating revenues as a factor in these exhibits in each instance. No use has been made of net operating revenue in determining values of plaintiff's Wyoming property. I can not answer for the general public as to the basis of value for the purpose of investment in plaintiff's securities including its stocks and bonds— I have not purchased any myself. My opinion is that it is the earning power of the properties underlying the securities, which enables them to pay their interest or dividends or whatever it may be.

I said under direct examination that to determine the value of the operative properties of the whole system of plaintiff for the year 1930, that I capitalized the net operating income at 6%. Net operating revenue does not constitute a factor that fixes the value of the plaintiff's securities in the market instead of gross operating revenue. Net operating income is the gross operating revenue less all of the expenses of operation. Net operating income does not constitute a factor but is a fact that is considered in fixing the value in the market of plaintiff's securities. Net operating income has a relation to the value of plaintiff's securities in the market. That is the securities including the stocks and bonds of the plaintiff are bought and investments are made therein because of their value in power to produce income to the investor.

If the records of operation of a railroad system satisfy the investor that the result of operations is a net income, which would result in a profit on his investment, I would say that gross operating revenue would be a factor in inducing the purchase of the securities of the system.

I do not know offhand and have no exhibits setting up the percentage relation of the net operating revenue in Wyoming upon plaintiff's operative property to the net operating revenue of plaintiff's entire operative system. I have not given consideration to that relation in determining the value of the properties of plaintiff in Wyoming for [fol. 81] taxation and in presenting my theory to the State Board of Equalization I did not use these two amounts as a factor in determining for taxation plaintiff's operative property in Wyoming for the year 1930 nor for any other year. I used net operating income capitalized at 6% in determining the value of the whole system of plaintiff's operative properties. As the statistician for plaintiff, I determined, for the purpose of taxation of the plaintiff, the valuation of its operative properties in the nine states through which its system operates. I made figures for Wyoming and for all of the states. My figures have not been refused anywhere. Wyoming did not tax upon my set-up. I filed my figures for consideration everywhere. I do not know what basis the other states did use. They sometimes take my figures as far as they go and modify them according to their ideas, and I can not safely say. I think that they have been influenced by my figures in every state where we have filed them; they have given them serious consideration. They have been influenced toward accepting my figures. They have acted upon them as submitted in some instances, but not in every instance. The value of the operative properties of plaintiff located in the other eight states has not been determined by use of the same three factors, as submitted in Wyoming as a proper basis for valuation.

In the State of Minnesota, we are taxed on a gross earning basis, and, of course, these figures are not submitted. Nine states, of course, include Minnesota, that should always be excepted. In Nebraska the last two years they have used our gross earnings factors and the miles of all track, discarding the other two. In the State of Wisconsin, they use all of my factors and in addition, three others. In the State of Iowa, they use all of my factors and one or two others. In the State of South Dakota, we have no knowledge any more than we have in Wyoming what they use.

In the State of Illinois, we have no knowledge of their basis and we file our figures, and as I say, they have been influenced, tending from their conclusions, toward my conclusions. They have not given 100% consideration to them, but they have given them serious consideration. We do not know what Michigan does, they come very near to my figures, but we do not know how they do it.

The percentages of the value of the property of the sys- [fol. 82] tem that I assign in my set-up is a theory that is generally accepted.

My set-up will not remain constant if the exact value which I propose is not accepted in a particular state. It will have to fluctuate according to the difference in value. My percentage of set-up will vary with the use, but it will represent the use always and it varies not much from year to year among the several states.

If we assign to Nebraska forty million dollars of valuation of our property for taxation and they assess it at sixty million, we would go to court then. Such action by Nebraska would not vitiate my figures at all; it would merely indicate that they did not accept them.

If the nine states do not tax upon the percentages I furnish, some assessing at a greater value and some at a less, then my table of allocated percentages will not reflect the physical value in the different states, but we are overtaxed. I do not know of any states where they are less than ours. If there is any deviation, it is an over-assessment like it is in this state. Of course, if one state imposes undue burdens upon us and the other does and the other does, it becomes unbearable, that is all.

I have never suggested to the State Board of Equalization of Wyoming that the two factors in my Exhibit L, miles of road operated, 3.29, and miles of all tract, 2.80, should be used by it as two factors in determining valuation of plaintiff's property in Wyoming. In fact, I filed that exhibit to show my objection to the use of them, the impropriety of their use.

All freight traffic originating at one point in any state and terminating at another point within that state, is allocated to the state itself. All traffic originating in one state and terminating in another state or passing through two or more states is allocated to the several states on the basis of the mileage traveled in making the transportation serv-

ice—the mileage in each state. In the allocation of freight that goes from one state to another we do not give any consideration to the freight rate basis or differential in the basis. If the freight rate in Wyoming is higher than it is in the other states or if it is lower, it is allocated on a parallel of the mileage proportion. I can not answer offhand whether there are any states where the freight rate is lower than in Wyoming.

[fol. 83] For the year 1930, the plaintiff reported in its return to the Wyoming railroad commission that net operating revenue in Wyoming was $656,139.75, and the total net operating revenue for the system for the same year was $28,939,050.20—net revenue, not net income. This would be $2,357 per mile of road for Wyoming. For the entire system, the net revenue for the year 1930 was $3,421 per mile of road. The percentage relation of the per mile operating revenue in Wyoming to that of the system is about 69%. 69% of the average value per mile of road of the system, $44,360, is $30,608, representing the value of a mile of road in Wyoming as compared to the value of the average mile of the system determined in this manner. The State Board of Equalization determined the value of the operating properties of plaintiff in Wyoming for taxation for 1931 at $28,313. The valuation placed by the Board upon the per mile of track in Wyoming for taxation is not as high as the valuation arrived at by this method of computation.

Redirect examination:

The only means by which I am able to tell what moves the buying public to buy stocks in any corporation, or any securities at all, is to derive a profit. The market value is what the public is willing to pay and does pay. All of the factors, with reference to which I have been interrogated on cross-examination, have been taken into account in the system valuation by stocks and bonds and by the factors of traffic units, and operating income, and use of rolling stock, within the state.

Examination by the Court:

$2,357 per mile of road in Wyoming represents the difference between the gross operating revenues and the items

that are classified as operating expenses. It does not include the item of taxes. It is designated as net revenue. You will notice on Exhibit D for 1926, I have gross operating revenues of 154 million plus. Then I have operating expenses of 120 millions and after that is deducted, I have the item "Net Revenue for Railway Operations" of 33 million dollars, but there are still 11 million dollars of operating expenses that are not included in that figure and, therefore, it is not a conclusive figure. I have used the figure at the bottom, 22 million, which is the conclusive figure. The figure $2,357, is the net revenue of operation and compares with the 33 million figure on the exhibit.

[fol. 84] J. A. LORCH, a witness in behalf of plaintiff, testified:

Direct examination:

I live in Evanston, Illinois, and have been employed for fifteen years by the Chicago and North Western Railway Company as valuation engineer. Previous to that, I was employed for five years in the engineering department of the plaintiff on maintenance and construction work. Previous to that, I was for two years in the trackage department of the plaintiff. I have been employed by plaintiff for twenty-seven years. I am personally familiar with the properties of the plaintiff throughout its entire system—I believe as familiar as any one man can become with the property of a railroad of 8,000 miles. I have been over the entire system. I am familiar with the office records of the company as to its properties and the character of them throughout the system.

My duties as valuation engineer are to co-operate with the Bureau of Valuations of the I. C. C. in connection with valuation matters and to furnish the commission with such reports and returns as are called for by various valuation orders. All of this work is done under my personal supervision. I am familiar with the work done by the Valuations Bureau of the Interstate Commerce Commission under the act of 1913 and with the progress of that work from the beginning. I supervised the work of the Chicago and North Western Railway forces who were co-operating

with the bureau in making their inventory of the property of the plaintiff. After the valuation act became effective, the Bureau of Valuations of the I. C. C. put forces into the field to make an inventory of all the physical property of the railroad. These field forces, as a matter of convenience and to avoid duplications, were divided into three distinct groups or branches, roadway and track branch, to inventory the roadway and track items; the land section, to inventory and investigate the right-of-way and carrier land and non-carrier land; and the equipment forces, which were to inventory the equipment of plaintiff. The fixed physical property was inventoried by states. The land was inventoried by states. The equipment was inventoried for the system as a whole. After the inventories of the operating property of the plaintiff were all completed, they were furnished us by the I. C. C. The decision by the I. C. C. as to the valuation of the property of plaintiff was rendered by the commission in 1928. The value of the entire system was fixed at $501,658,211, which figure was ar- [fol. 85] rived at on the basis of cost of property. This value was arrived at first by state boundaries. The amount of rolling stock was arrived at for the system as a whole and no division was made of rolling stock by states. The Bureau of Valuation of the I. C. C. ascertained the cost of reproduction and cost less depreciation of the property as of June 30, 1917, with the 1910-1914 price level.

(Thereupon was introduced plaintiff's Exhibit S, a classified statement of plaintiff's operating property in Wyoming as of June 30, 1917, compiled by the Interstate Commerce Commission June 5, 1928, showing the cost of plaintiff's property in Wyoming to be $6,954,766.00 and the cost, less depreciation, to be $5,194,594.00.)

Exhibit S is a summary of the summary sheets of the properties of plaintiff in the State of Wyoming, which extends to the state line from Lander, Wyoming. This exhibit includes the fixed physical property and excludes land, equipment and rolling stock. They include road, grading, track, rail, bridges, buildings and all other property exclusive of land and equipment. Right-of-way is not included.

(Thereupon was introduced plaintiff's Exhibit T.)

Exhibit T includes all operating property of plaintiff as valued by the I. C. C., to which has been added additions of properties installed subsequent to the valuation date. That is, additions and retirements, or betterments less retirements, which shows the actual investment in the property from year to year and the amounts by years. The total net additions amount to $167,540,005, which makes a total as of December 31, 1930 on a cost basis of $669,198,216.

(Thereupon was introduced plaintiff's Exhibit T-1, being of the same general character as Exhibit T, but limited to the State of Wyoming.)

Exhibit T-1 is the amount of property shown in Exhibit T but prorated to the State of Wyoming on the basis of the reports submitted by the I. C. C. of the property of plaintiff in the State of Wyoming. It shows the value of the property of plaintiff located in the State of Wyoming and allocated to the state as of June 30, 1917 was $7,242,363. [fol. 86] It shows the actual investment in plaintiff's operating properties in the State of Wyoming since June 30, 1917 to December 31, 1930 to be $4,481,763, and a total of plaintiff's operating properties in Wyoming as of December 31, 1930, to be $11,724,126. There is depreciation in these figures as near as can be ascertained of the property both as to the system and that located in Wyoming as of the date of June 30, 1917, but no depreciation has been figured on either the additions to the system or to the portion located in the State of Wyoming.

(Thereupon were introduced plaintiff's Exhibits U and U-1, U-2, U-3 and U-4, U-5, U-6, U-7, U-8 and U-9.)

Exhibits U to U-9 were prepared by me and are intended to show the physical characteristics of the Chicago and North Western Railway in the various states of the property. They show in a general way the physical characteristics of the main items of the property throughout its entire system.

PLAINTIFF'S EXHIBITS U AND U-1

Illinois

Mileage

820 Miles of Road.
264 " " 2nd Track—Chicago to Clinton, Chicago to Harvard, Chicago North to State Line.
61 " " 3rd Track—Chicago north to State Line, and Chicago to West Chicago.
56 " " 4th Track—Chicago north to State Line.
1092 " " Yard Track and Sidings.

Weight of Rail

197 Miles 110# Rail—Chicago to Clinton and Chicago to Milwaukee.
635 " 100# "
200 " 90# "
86 " 80# "
73 " 72# "
10 " 65# " or Less.

Grading

Over 51,000 cu. yds. per Mile.

[fol. 87] Grade Separation

Chicago Shops to Evanston via Mayfair	10	miles
Chicago to Wilmette	15	miles
Chicago to Jefferson Park	10	miles
Chicago to River Forest	10	"
South Branch Chicago	5	"
Total	50	miles Track Elevation and 300 Subways.

Ballast

1,500,000 cu. yds. Crushed Stone.
12,000,000 Total cu. yds. all kinds or 10,000 cu. yds. per mile.

Bridges

3 Heavy Bascule Bridges spanning Chicago River in Chicago, costing over a quarter million dollars each.

Bridge over Mississippi River at Clinton—nearly $1,000,000.

Bridge over Illinois River, at Peoria—over $300,000.

Stations

4 Miles apart.

Principal Yard Tracks

Chicago	300 Miles	South Pekin	41 Miles
Proviso	218 "	Waukegan	15 "
West Chicago	35 "	East Clinton	29 "

Signal Protection

Automatic Train Control—Chicago to Clinton	137 Miles
Automatic Signals—Chicago to Harvard	63 "
Chicago to State Line, Milwaukee Lines	.45 Miles

General

Chicago Terminal Depot	$24,000,000
New Express Terminal	4,000,000
Proviso Freight Classification Terminal	16,000,000
Chicago Potato Yard	15,000,000
Chicago Shops, 240 Acres in City.	
New Freight Terminal—Merchandise Mart	1,500,000

Industrial Districts

Chicago, Rockford, Geneva, Elgin, DeKalb, Sterling and Dixon.

[fol. 88] (Witness testified:)

Grade separations in Chicago are generally known as track elevations separating the main line grade above the street level to permit traffic on the streets without interruption. Track elevations bring the grade of the tracks up from twelve to fifteen feet so as to afford greater room at the subways and for the traffic of the streets without interruption.

Plaintiff has about 300 subways that were built in connection with the track elevation and cost nearly $9,000,000. The balance of the track elevation cost about 11 million dollars, making a total of 20 million dollars. There are no track elevations in Wyoming. There is no crushed stone ballast in Wyoming. Most of the ballast in Wyoming was placed in recent years subsequent to the valuation date.

The bridges enumerated on the exhibit are just some of the more important structures that plaintiff has in the State of Illinois. There are no bridges in Wyoming comparable at all to the bridges described on the exhibit.

All the other bridges in Illinois are of a permanent type, concrete culverts or castiron pipe or concrete trestles—all permanent bridges, stone or concrete arches. Most of the bridges in the State of Wyoming are of a temporary nature, pile trestles. There are some permanent structures.

Stations in the Chicago territory and the suburbs of the city are generally of brick construction—brick and stucco with long brick platforms, and sometimes extending two blocks to accommodate long suburban trains. The stations in Illinois are generally of a permanent construction; very few frame structures except on the branches.

In Wyoming we have a very nice brick station at Casper. We have one or two others that are stucco and frame, but as a general rule, they are all of temporary construction. About one-fourth of the stations, outside of those mentioned, in the State of Wyoming are car bodies and platforms. They are not depot buildings at all. In Illinois, the stations are located with reference to centers of population in towns and cities and this is true throughout the state. The cities in Illinois served by the Chicago and North Western Railway range from 3½ million to 20,000 or 8 or 10 thousand.

[fol. 89] We have one station in Wyoming at Casper that compares favorably with some of the stations in Illinois. In Wyoming I would say that Casper, of course, is the principal point as far as cities are concerned. Lander, Riverton, Douglas, Hudson are others, and Lusk used to be quite an important point although it is not so important just now.

There are yard tracks at smaller stations in Illinois. Those in the exhibit are the most important ones.

Because of the use of the large size switch engines which are used in the State of Illinois, plaintiff has to use heavier rails for its yards and sidings than is ordinarily used for yard tracks and sidings. This is so, also in Wisconsin and Iowa as well. In the Proviso yard and around Chicago, plaintiff has quite a large amount of ninety pound rail in the yard tracks and sidings. That is, the same weight rail that we have in Wyoming, but we only have about eleven miles of that in Wyoming—the rest of it being 72 and 60 pounds.

There are no automatic signals in the State of Wyoming.

The Chicago Terminal Depot was completed in 1911. The Proviso freight classification terminal covers approximately 1500 acres and is located west of the Chicago limits. The Chicago potato yards were constructed two years ago. The Chicago shops are the principal repair and construction shops of the plaintiff.

The depots, shops, switch yards, etc. in the cities enumerated in the exhibit are all very high class railroad property.

Practically all of the State of Illinois, served by the plaintiff, is densely populated. There are no vacant or unoccupied lands in the section of the state traversed by the Chicago and North Western Railway. I would say that the approximate population living in the territory served and traversed by the plaintiff is about five million.

PLAINTIFF'S EXHIBIT U-2

Michigan

Mileage

526 Miles of Road.
66 " " 2nd Track.
451 " " Yard Tracks and Sidings.

[fol. 90] Weight of Rail

60 Miles 100# Rail.
195 " 90# "
146 " 72# "
191 " 65# " or Less.

Grading

21,000 cu. yds. per Mile.

Ballast

2,000,000 cu. yds. all kinds or 3367 cu. yds. per Mile.

Stations

4 Miles apart.

Principal Yards

Escanaba ..... 55 Miles
Menominee ..... 15 "

Spurs to Mines and Industrial establishments, 78 Miles.

General

Iron Ore business.
2 Ore Docks at Escanaba, $2,700,000.
Tie Treating plant Escanaba, $345,000 Excl. of land.

(Witness testified:)

The southern part of the state, just a small portion of the southern part of the state of Michigan, as traversed by the Chicago and North Western Railway, is quite fully settled. The balance of the state is not very fully settled. It is not quite as sparsely settled as it is in Wyoming. The principal business in the State of Michigan is the ore business. The logging industry also is quite extensive. I would say the population of Michigan, served by the North Western Railway, is about 750,000.

PLAINTIFF'S EXHIBITS U-3 AND U-4

Wisconsin

Mileage

2145 Miles of Road.
232 " " 2nd Track—Milwaukee to Clyman, and Line around Milwaukee, Evansville to Elroy—State Line to Milwaukee, Thru City of Janesville.
40 " " 3rd Track—State Line to Milwaukee.
35 " " 4th Track—State Line to Milwaukee.
1186 " " Yard Tracks and Sidings.

[fol. 91]

Weight of Rail

35 Miles of 110# Rail.
893 " " 100# "
703 " " 90# "
170 " " 80# "
409 " " 72# "
239 " " 65# " or Less.

Grading

27,000 cu. yds. per Mile of Road.

Grade Separation

3.6 Miles Track Elevation in Milwaukee.
5.4 " " Depression in Milwaukee.

9.0 " Grade Separation.

Ballast

450,000 cu. yds. Crushed Stone.
17,000,000 cu. yds. All kinds or about 7,000 cu. yds. per Mile Track.

Bridges

3 Draw Span Bridges over Kinnickinnic and Milwaukee Rivers at Milwaukee costing over $100,000 each.
Bridge over Wisconsin River at Merrimac costing nearly $400,000.
Fox River Bridge at Green Bay, costing over $300,000.
Mississippi River Bridge at Wiona costing nearly $300,000.

Stations

5.5 Miles apart.

Principal Yards

Between Kenosha and Milwaukee	182 Miles
Janesville	35 "
Fond du Lac	31 "
Green Bay	50 "

Madison	25	"
New Butler and Chase	34	"
Sheboygan	30	"
Manitowoc	28	"
Ashland	38	"
Spurs to Mines and Industrial Establishments	46	Miles

[fol. 92] Signal Protection

Automatic Signal	Harvard to Elroy	148	Miles
	Milwaukee to Wyeville	154	"
	Milwaukee to Manitowoc	80	"
	State Line to Milwaukee	40	"
	Milwaukee to Fond du Lac	60	"
	Fond du Lac to Green Bay	66	"

General

Lumber and Paper Mills, Wausau, Oconto, Kimberly, Green Bay.

3 Ore Docks at Ashland—$4,000,000.

(The witness testified:)

Plaintiff has very elaborate stations at some of the towns in Wisconsin. Madison is one of the newest and most elaborate, and it also has very good stations at Kenosha and Muskegon. All the stations are permanent and modern.

The mining and industrial establishments in Wisconsin are of the same character as those of Michigan. The principal industries of the state are lumber and paper. There are iron mines in the northern part of the state for which we have furnished three ore docks at Ashland.

As near as I can estimate the population served by the North Western Lines in Wisconsin, it is approximately 3,000,000. The southern and southwestern portions of the state are densely populated. The extreme north part is sparsely settled and is about the same character as that of Wyoming.

PLAINTIFF'S EXHIBIT U-5

Iowa

Mileage

1614 Miles of Road.
359 " " 2nd Track.
530 " " Sidings and Yard Tracks.

Weight of Rail

216 Miles 100# Rail.
538 Miles 100# "
400 " 90# "
166 " 80# "
414 " 72# "
229 " 65# " or Less.

[fol. 93]

Grading

28,000 cu. yds. per Mile.

Ballast

2,000,000 cu. yds. Crushed Stone.
12,600,000 cu. yds. All kinds or 7,000-cu. yds. per Mile.

Bridges

Double Track Draw Bridge over Mississippi River at Clinton costing $500,000.
Des Moines River Bridge at Boone costing over $600,000.
Missouri River Bridge at Blair costing over $500,000.

Stations

6 Miles apart.

Principal Yards

Boone ..... 36 Miles.
Council Bluffs ... 43 "
Missouri Valley.. 20 "
Clinton ..... 45 "
Belle Plaine ..... 18 "
Cedar Rapids ... 16 "
Tama ..... 17 "

Signal Protection

Automatic Train Control Clinton to Council Bluffs 346 Miles.

General

Shops and Yards at Clinton, Belle Plaine, Mason City, Council Bluffs, and Repair Shops at Missouri Valley. Grain Elevator at Council Bluffs, 2,375,000 bu. Capacity—$1,450,000.

(Witness testified:)

The stations in Iowa, as to construction along the main line, are all practically permanent—brick and stone. They are all located in important towns. The principal shops of plaintiff are located at Clinton, Belle Plaine, Mason City, Council Bluffs, and it has extensive repair shops at Missouri Valley.

That portion of Iowa traversed by the North Western is fully populated. I would estimate that about two million population is served by the lines of plaintiff in Iowa.

PLAINTIFF'S EXHIBIT U-6

[fol. 94] Minnesota

Mileage

650 Miles of Road.
175 " " Yard Tracks and Sidings.

Weight of Rail

18 Miles 100# Rail.
180 " 90# Rail
39 " 80# Rail
213 " 72# "
200 " 65# " or Less.

Grading

18,000 cu. yds. per Mile.

Ballast

30,000 cu. yds. Crushed Stone.
3,200,000 " " All kinds or 5,000 cu. yds. per Mile.

Bridges

Minnesota River Bridge west of Mankato costing $200,000.

Stations

6 Miles apart.

Principal Yards

Winona ..... 30 Miles.
Tracy ..... 15 "

(Witness testified:)

Half of the stations in Minnesota are of permanent construction and are modern and up to date.

The lines of plaintiff traverse in Minnesota the thickly settled part of the state and I would say that the population served is approximately 300,000.

PLAINTIFF'S EXHIBIT U-7

South Dakota

Mileage

1265 Miles of Road.
206 " " Yard Tracks and Sidings.

[fol. 95] Weight of Rail

24 Miles 100# Rail.
79 " 90# "
116 " 80# "
464 " 72# "
582 " 65# " or Less.

Grading

18,000 cu. yds. per Mile.

Ballast

33,000 cu. yds. Crushed Stone.
3,500,000 cu. yds. All kinds or 2,800 cu. yds. per Mile.

Bridges

Missouri River Bridge at Pierre costing nearly $1,000,000.

Stations

8 miles apart.

Principal Yards

Huron ..... 20 miles.
Pierre ..... 14 miles.

(Witness testified:)

The principal bridge of plaintiff in South Dakota is located at Pierre, and a few stations of South Dakota are permanent, modern depot buildings, but the general character of the stations is frame buildings. There are no box car stations in that state.

The eastern half of South Dakota is quite thickly populated. The balance is about semi-sparsely populated, I would call it. About 100,000 population are served in South Dakota by the lines of plaintiff.

PLAINTIFF'S EXHIBIT U-8

Nebraska

Mileage

1069 Miles of Road.
2 " " 2nd Track.
244 " " Yard Tracks and Sidings.

[fol. 96] Weight of Rail

52 Miles of 100# Rail.
172 " " 90# "
30 " " 80# "
369 " " 72# "
448 " " 60# " or Less.

Grading

23,000 cu. yds. per Mile.

Ballast

2,300,000 cu. yds. all kinds or 2,150 cu. yds. per Mile.

Bridges

Missouri River Bridge at Blair costing $160,000.
Platte River Bridge at Fremont costing nearly $500,000.

Stations

8 Miles apart.

Principal Yards

Omaha	20 Miles.
Fremont	18 "
Norfolk	17 "
Chadron	13 "
Lone Pine	12 "

Omaha Freight Terminal $545,000.

(Witness testified:)

The principal bridges of plaintiff in Nebraska are located at Blair and at Fremont. Plaintiff has a few permanent, modern stations in Nebraska. The balance are of the frame type. Plaintiff has an elaborate freight terminal at South Omaha, which is owned jointly with the Chicago, Milwaukee, St. Paul and Omaha and cost $545,000, one-half of the cost of which was borne by plaintiff.

The eastern half of the lines in the State of Nebraska and the South Platte lines pass through a densely populated territory. The western half is sparsely settled. I would say the population served by the lines of plaintiff in Nebraska would be about 600,000.

PLAINTIFF'S EXHIBIT U-9

[fol. 97] Wyoming

Mileage

278 Miles of Road.
95 " " Yard Tracks and Sidings.

Weight of Rail

11 Miles 90# Rail.
222 " 72# "
45 " 60# "

Grading

21,000 cu. yds. per Mile.

Ballast

420,000 cu. yds. of all kinds or 1,500 cu. yds. per Mile.

Stations

31—9 miles apart. ¼ Carbodies.

Principal Yards

Casper.....	22	miles	of	Trackage.
Hudson.....	9	"	"	"
Lusk.....	6	"	"	"

Oil Fields at Casper.

(Witness testified:)

Plaintiff has thirty-one stations in the State of Wyoming or station stops.

The principal industries are located at Casper where there is the oil industry, and the coal mines located at Hudson. I would say that the population served by the North Western Railway in Wyoming is approximately 25,000. It is sparsely settled. The extreme western part of Nebraska is the only territory served by the North Western as sparsely settled as the portion of Wyoming through which plaintiff's line runs. I have described in the exhibits the more important stations of plaintiff and the general characteristics of the property of plaintiff throughout the different states.

Cross-examination:

I do not know what factors the State Board of Equalization of Wyoming considered in arriving at its value of the Chicago and North Western Railway in Wyoming for the year 1930. The merchandise marked and the potato yard described in Exhibit U and U-1 are used exclusively by [fol. 98] plaintiff. I do not know whether it is cheaper to haul a mile of freight in Wyoming than it is in other states where there are elevated tracks, automatic signals, large bridges and other extensive equipment. Exhibits U to U-9, inclusive, have no relation to value whatever. They are descriptive testimony describing the characterist-s of the property in one state as compared with the property in other states. There is no question but what states that have a large amount of property, or more extensive property in them, have a greater value. Exhibits U to U-9 probably are related to value, although that was the cost figure as of June 30, 1917. The property listed in these

exhibits are the facilities in the property today. If the State Board of Equalization arrived at a certain figure representing the value of plaintiff's property of a certain date, it certainly must have included some of the facilities that I have recited in these exhibits. I do not know whether those are the factors used in arriving at that valuation. There may be bridges in Fremont County, Wyoming, to the value of $176,091. I do not know, but would think that approximately correct. It probably is correct that there are bridges of plaintiff in Natrona County, Wyoming, of the value of $195,600. It is approximately correct that there are bridges of plaintiff in Converse County, Wyoming of the value of $162,958, and in Niobrara County, Wyoming of the value of $102,901. The bridges that I have listed in my exhibits U to U-9 are merely a few of the important structures that plaintiff has in various states. All of the structures enumerated in these exhibits are constructed and maintained as a part of the system of the Chicago and North Western Railway Company to serve its operation purposes as part of its main line, including the big Mississippi River bridges and the little gully bridges in Wyoming and probably serve the same purposes, and the same thing is true with reference to the stations. Plaintiff receives freight and passengers fro mits box car stations. Plaintiff delivers passengers at its box car stations; I am not qualified to say whether it delivers freight or not. Plaintiff hauls ties from its tie treating plant at Riverton, Wyoming, but not throughout the entire system. Automatic signals are put into control and facilitate traffic. I presume that if conditions warranted it, plaintiff would install signals in Wyoming. Casper, Wyoming, is to some extent also a live stock shipping point. Also, sugar beets originate at Riverton and other points along the lines of plaintiff.

[fol. 99] Redirect examination:

I did not have anything whatever to do with arriving at the system value of plaintiff's properties based upon the market value of stocks and bonds and based upon capitalized net income. The figures fixed by me and testified to, as to the value of the physical property, had to do with the appraised costs, etc.

WILLIAM F. CARROLL, a witness on behalf of plaintiff, testified:

Direct examination:

I live in Casper, Wyoming, and am employed by the plaintiff in the capacity of Assistant Superintendent. I have been employed by plaintiff forty-four years, and in my present capacity in Casper, six years.

No revenue is derived by the plaintiff in the back haul of empty cars. That is an expense.

Plaintiff does not own the tank cars used by it in hauling petroleum and its products. They are owned by various owners. Plaintiff pays a rental on the tank cars used by it while they are being returned empty to be again loaded, of a cent and a half a car mile.

R. A. MILLER, a witness on behalf of plaintiff, testified:

Direct examination:

I live in Oak Park, Illinois. I am employed by plaintiff as Tax Commissioner and have been so employed for eight years. The property of plaintiff in Wyoming, subject to assessment by the State Board of Equalization, has been assessed during past years as follows:

In 1931—$7,881,004;	1925—$8,143,000;
1930—$7,970,916;	1924—$8,131,088;
1929—$8,000,757;	1923—$8,167,071;
1928—$8,104,178;	1922—$7,630,686;
1927—$7,955,791;	1921—$7,723,807;
1926—$7,881,663;	1920—$6,937,275;

Plaintiff claimed the assessable valuation of its property [fol. 100] in Wyoming for 1931 to be assessed by the State Board of Equalization to be $5,849,870; for the year 1930, $6,061,240; for 1929, $6,076,297; for 1928, $6,136,376; for 1927, $6,175,609.

The taxes on the operative property of the State of Wyoming, as assessed by the State Board of Equalization for the year 1931, were $182,455.80, all of which have not been paid. All prior years have been paid and were for 1930, $162,180.86; for 1929, $163,947.27; for 1928, $159,-

248.09, and for 1927, $153,068.17. These taxes included the levies made by the State Board and also the levies made for municipal purposes by the County Assessors. With reference to the figures claimed by plaintiff in its report for 1931 to be the proper amount of valuation, these do not include anything except the levy made by the State Board of Equalization.

Cross-examination:

The State Board of Equalization places a valuation on the property of plaintiff. I have quoted the assessed values. I am not the principal accounting officer of plaintiff.

Thereupon was marked for identification, Defendants' Exhibit 1. I know what defendants' exhibit 1 is. My signature appears on final seeet 13. (Final Sheet 13 of defendants' exhibit No. 1 is as follows:)

DEFENDANTS' EXHIBIT 1

SHEET 13

Railroads

Return for Tax Assessment of Chicago and North Western Railway Company for the Year 1930

Recapitulation—Property Statement

Sheet No.	Items		Valuation
6	Trackage, Right-of-Way and Road Bed:		
	(1) Trackage:		
	(a) Main Track	$2,085,551	
	(b) Second Track		
	(c) Side Tracks and Turnouts	426,300	
	(d) Spur and Warehouse Tracks		
		$2,511,851	$2,511,851
	(2) Right-of-way and Road Bed		2,406,914
[fol. 101] 8	Depots, Station Houses, and other Buildings and Structures, etc.		$554,993

Sheet No.	Items		Valuation
9	Rolling Stock:		
	Locomotives	$468,350	
	Passenger Train Cars	93,250	
	Freight " "	1,269,209	
	Work Equipment	57,517	
			1,888,326
10	Bridges, Tunnels, Snow Sheds, Snow Fences, and Right-of-Way Fences		726,727
11	Material and Supplies		179,688
12	Roadway Tools and Machines		13,451
	Grand Total Valuation		$8,281,950

STATE OF ILLINOIS,
County of Cook, ss:

I, R. A. Miller, Tax Commissioner of Chicago and North Western Railway Company, do solemnly swear that the above and foregoing Tax Return of Chicago and North Western Railway Company, to the State Board of Equalization of the State of Wyoming, for the year 1930, embracing Sheets Nos. 1 to 13 inclusive, of S. B. of E. Form 4, is true and correct to the best of my knowledge and belief, and that I have listed within said Tax Return, all of the property belonging to and used in the operation of said Company within the State of Wyoming, which is assessable for taxation by the State Board of Equalization of the State of Wyoming, as provided by law.

Chicago and North Western Railway Co., (Signed) R. A. Miller, Its Tax Commissioner.

Subscribed in my presence and sworn to before me this 6th day of May, A. D. 1931. (Signed) Leo C. White, Notary Public. (Seal) My commission expires Feb. 9th, 1935.

(Note attached near top of sheet:)

"The valuations shown in this return are based upon the estimated cost of reproduction new of the physical properties of the Company in the State of Wyoming, less depreciation, and without further reference to the market value of such properties, or the market value of the stocks and bonds of the Company or the present earnings of the [fol. 102] Company on said properties or the present or future earning capacity or possibilities of such properties.

"It is claimed that the valuations stated in this return do not represent the fair cash value of the property for purposes of taxation. The value as to the system, as a whole, and as to the part in the State of Wyoming is clearly and fairly set by the figures contained in the exhibits attached to this return and made a part thereof, and which said exhibits show that the total true value of all the property of the Chicago and North Western Railway Company, or every kind and nature whatsoever situated in the State of Wyoming, or properly allocated to the State does not exceed $5,849,570.

"The valuation above stated $5,849,570 should be further reduced for taxation purposes by applying an equalization ratio, which ratio shall not exceed the ratio of the assessed value to the true value of other taxable property in the State."

I took the oath prescribed there. The figures, $8,281,950 appear on the last sheet. I put those figures there and swore to them. The note on page 13 refers to the market value of the property. It is the value that I claim plaintiff should be taxed on. When I gave that value in response to counsel, it was what I claimed and certified to the Board. This exhibit came from my office. My department prepared it. My department is the Tax Department. There are clerks in the department and a man by the name of Pellatier, one of the clerks, undoubtedly typed it. I dictated that information to him.

In the note attached to page 13, the exhibits referred to are by Mr. Balch, statistician. Some of the figures were prepared by him. The exhibits were not requested by the board. The note on page 13 was not requested by the board. It was added for the purpose of clarifying the figures shown in the report and to call attention to the fact that they were cost figures.

Reports of plaintiff are required to be filed on forms prescribed and furnished by the State Board of Equalization. These forms call for information as to various classes of property. It is impossible to divide the market value of the property in Wyoming based upon the system figures and the allocation factors into these various parts. The [fol. 103] Board of Equalization does not state what value they require plaintiff to give when it makes its return.

The form simply says "valuation." I do not know what the laws of Wyoming require plaintiff to do. We tried to follow the instructions of the Board in their forms they provide. We tried to follow the law. I do not recall the wording of the law just at this time. I have read it a number of times. I swore to the entire report, defendant's Exhibit 1. Under item 4 are listed the various items of cost and sources of revenue, and allocation of the same with reference to Wyoming, which are taken from the operations of the system for the year 1930. The percentage of railway operating revenues assigned to Wyoming as of the whole, I think, is about 1.46%—somewhere along there. I do not have the percentage figures on each of those comparative assignments there. I have never computed them. I do not know what the relation of one to the other is. I know how the ratios are arrived at. I do not know just what ratios are referred to. This exhibit shows that the interest on the funded debt of the system for 1931 was $16,241,372.13, and there is charged to Wyoming $539,213.56 of this debt. These are accounting department figures, and I am not versed as to the allocation of many of the accounts. The statement is furnished by our Accounting Department. I do not know where they get the comparison. I do not know what that percentage is. I do not know anything about eleven of those items which have been allocated to Wyoming as of a basis of 3.22%. I would not say it was a fact unless I computed it. I haven't any computation of that kind prepared or with reference to the other items that have been testified to.

I do not know what factors were used by the State of Wyoming or by the State Board of Equalization to determine the value of the property in Wyoming for assessment purposes.

Plaintiff prepared a similar statement as Exhibit 1 for tax return for the years 1930, 1929, 1928 and 1927, and I signed and swore to the entire report for each year. Defendant's Exhibit 1 is based entirely on cost figures and also used for the purpose of taxation.

(Thereupon was marked for identification, defendant's Exhibit No. 2, being tax return filed with the State Board of Equalization of Wyoming in the year 1930, similar as to

form and information therein contained, to defendants' Exhibit 1.)

[fol. 104] I do not think defendants' Exhibit 2 is complete. I think some of the supplemental exhibits are lacking. I signed and verified the return, Exhibit No. 2. The return is not bound in the manner in which it was filed and is not a duplicate in its entirety of the copy retained when it was filed. There is missing from that return, unless it has been misplaced from one of the sheets there, the supplemental exhibits prepared by Mr. Balch showing the market value of the property. That is with reference to the exhibit I attached to each one.

(Thereupon was marked for identification defendants' Exhibit No. 3, being tax return filed with the State Board of Equalization of Wyoming in the year 1929, similar as to form and information therein contained, to defendants' Exhibit 1.)

I signed and verified that return, defendants' Exhibit No. 3.

(Thereupon was marked for identification, defendants' Exhibit No. 4, being a tax return filed with the State Board of Equalization of Wyoming in the year 1928, similar as to form and information therein contained, to defendants' Exhibit 1.)

I signed and verified that return—I mean the return that was filed with the tax board for assessment purposes.

(Thereupon was marked for identification, defendants' Exhibit No. 5, being tax return filed with the State Board of Equalization of Wyoming in the year 1927, similar as to form and information therein contained, to defendants' Exhibit 1.)

I signed and verified defendants' Exhibit No. 5, being a tax return of plaintiff.

Redirect examination:

The figures entering into the total of $8,281,950.00, appearing on page (printed number) 13 are the total figures representing or built on the cost basis. The printed sheets that appear in the exhibit were furnished to me by the State

Board of Equalization of Wyoming to be used in making the tax return, and I used the printed sheets so furnished. When I signed and swore to this return on the bottom of page 13, the typewritten sheet which appears to be attached and pasted on to it, was a part of that sheet and a part of the report. That same explanatory note was attached to these various reports from year to year.

[fol. 105] (Thereupon counsel for plaintiff read into the record the explanatory note attached to page 13 of the report, defendants' exhibit No. 1.)

(Thereupon it was admitted by counsel for defendants that the explanatory note attached to defendants' Exhibit 1, and just read into the record by counsel for plaintiff, was attached on the last page of each of the reports for taxation filed by plaintiff with the Wyoming State Board of Equalization, defendants' Exhibits numbered 2, 3, 4 and 5.)

The printed forms on which the same were made, and with the printing of which I had nothing to do, were alsfurnished me by the Wyoming State Board of Equalization and on which were made the taxation reports, defendants' Exhibits No. 2, No. 3, No. 4 and No. 5. Also, certain exhibits and letters attached to the same when filed, do not now appear to be a part thereof.

C. H. McWhinnie, a witness on behalf of defendants, testified:

I am a member of the State Board of Equalization of Wyoming. My appointment was made on April 1, 1927, but I was in the Land Office at that time and Governor Emerson asked me to stay there until the new incumbent of the Land Office came there, so it was toward the close of April that I qualified as a Member of the Board, and I have served continuously since that date. The State Board of Equalization taxes classes of properties, utilities, railroads, oil and other minerals, pipelines, and we set the value on live stock. These are the properties that the Board tax directly. We have made a habit of sending out recommendations to the various County Commissioners and County Assessors on what we thought would be an average of the various classes of lands, so that they would be equitably valued. We do

not actually direct that they should be assessed at any particular value, only as far as the relation between the counties is concerned, we direct that lands as well as all other property assessable by the County Assessors shall be assessed at its actual value.

The railroads, according to the laws, supply us with a list of their properties, and which they value. In the case of the plaintiff's property, the list of 1930 is valued by themselves at $8,281,950. There is a remark here which I be- [fol. 106] lieve has been read into the record before, but to connect it up, I will read the first paragraph.

(Witness reads first paragraph of note attached to Sheet 13 of plaintiff's tax return for 1931, which is the same note set out verbatim on Page 47 of this statement.)

The first thing that the Board undertook was to verify the figures as presented to them as being the valuations of the property reproduction cost new less depreciation, which is given here by the plaintiff as $8,281,950.00. This, we accomplished by taking the figures of the Interstate Commerce Commission values of 1917, and adding the betterments and applying depreciation of 2½%.

I may state in this particular instance that the Board directed me personally to do this, and then the Board, the entire Board, went over it. The next thing I did, since this remark on this states that this valuation has no reference to the market value of such properties or the market value of the stocks and bonds of the company, or the present earnings, I then took up the question of the earnings of the company. Taking the net railroad operating income I find that the Wyoming portion of that is 2.23 per cent of the entire net operating railroad income. This 2.23 per cent when applied to the system value gives us a value of $8,368,463 on an earning basis. I presented these figures to the Board and then we went to work and equalized the sum of these two figures divided by two with a property of like character in the State. I mean by "like character"—other railroads. And in equalizing the same, we arrived at the figure of $7,989,587.00. A notice was then sent to the plaintiff that that is what the Board had arrived at as the value of their property. The members of the plaintiff company appeared before the Board and presented a theory for the basis of valuation which was in the way of an objection as

to the value which the Board had notified them was found by it. So after it had made its objections and had brought out the point that they were not making very much money, the Board asked me to go to work again and ascertain whether we could allow them a reasonable reduction based on some figures which we could substantiate as against other property of like kind or character.

So I then went to work and figured out what I thought would be the best method of arriving at that and I took the [fol. 107] five years of the net operating revenue, added them together and divided them by 5, and I got the fraction of 2.114, and I thought that that was a ratio that would hold up anywhere. I mean that that was actually the earning capacity of the road. I arrived at the 2.114 by taking the net operating revenue for each of the years and found out what the net operating revenue in Wyoming was to the net operating revenue of the whole system for each year, and then added them up and divided them by 5. So then I went to work and I took the physical value as presented to us by the plaintiff, that is the physical value for reproduction new less depreciation, and figured out the ratio that that figure was to the entire value of the system. I mean the ratio of the verified amount of the property in Wyoming as related to the plaintiff's entire property. The presentation that the plaintiff made, although there are certain flaws in it, we accepted for this year, that is the total value of $375,285,902.00. That is the figure that was arrived at by the market value of the stocks and bonds and the capitalization of the net income at 6%, plaintiff's representation.

We accepted it for this year as the value of the whole. I took the physical value and the net operating income for 1930, and adding those together, and dividing them by two I get a ratio for Wyoming of 2.14 as the ratio to be applied to the whole for the Wyoming share of the whole property. Having arrived that far I went to work and figured out how I could reconcile those ratios to anything presented by the plaintiff. The plaintiff had presented the mean average of the three factors, traffic units, operating revenue, which applies to the gross, and use of rolling stock. The average for the five years was 1.56 per cent. I could not reconcile those figures with the figure that I thought was approximately the value that they should be assessed

at, but by taking the traffic units and the use of rolling stock, which was two of the three factors which they advocated, and taking the mean average between the gross and the net operating revenue. In connection with that there was a typographical error in the order issued to the extent that it said "net operating revenue," but it should have been the mean average between net and gross. I added the percentage of the track mileage, and taking those four factors, the mean average of which is 2.1 per cent of the value of the whole property that should be allocated to Wyoming. I presented this to the Board then and [fol. 108] the Board seemed to think that since we had taken two of the factors that the plaintiff had presented we would split another one with them—instead of taking the gross operating revenue we have taken the mean average between the gross and the net operating revenue, and we had added the mileage, the miles of main track, to arrive at this ratio. I presented it to the Board and they agreed that they thought that that was very fair and liberal with the plaintiff. It makes the amount of $7,881,004. 2.1 is the final percentage figure.

After that I went into the question a little more, and, to be certain that my ratio was right, I took the admitted figures as presented by the plaintiff, consisting of the physical value of the property as presented by the plaintiff. That works out 2.2 per cent of the system value. The net operating income works out 2.23. The gross operating revenue works out 1.46. The average of the traffic units and the use of rolling stock averaged 1.46, a ratio that is in keeping with the charges made by the plaintiff in an account submitted in their sworn statement for 1930.

I added these together and divided them—I have five factors and divided them—by five, and I get 2.14. Traffic units, and use of rolling stock, might very properly be used for the purpose of allocating the rolling stock to Wyoming, but, otherwise, in the case of the Northwestern, which is a branch line, really, enjoys no overhead traffic, under the conditions existing to use those as factors and to be fair to the State of Wyoming, there should be some rectification of those figures.

I mean by overhead traffic, bridge traffic, traffic that goes through. It comes in one end and goes out the other. So I figured out that the percentage of all traffic turned

over to the system by Wyoming, and other roads to the system, was 37.38 of the whole traffic, whereas the ratio in Wyoming as turned over was—the same figure for Wyoming was 11.33, a difference of slightly over 2 per cent. By taking the traffic units and use of rolling stock, as presented by the plaintiff, and adding 26 per cent of that I arrived at what I figured is a rectified condition of the traffic units and the use of rolling stock, as should be applied to Wyoming. To that I added the net operating revenue, in Wyoming, and divided the sum by two, and I get 2.15, and I felt convinced that the ratio that we had assessed them at was fair. I presented this to the Board and they approved it. That method determined the prop- [fol. 109] erty of the plaintiff in Wyoming to be, for taxation purposes in 1931, $7,881,004.00.

I might state, in connection with the use of the net operating revenue, in connection with the gross that I have used to get this factor, in Wyoming the percentage of the expenses, the operating expenses, to the gross operating revenue, is 65.56. On the whole system it is 77.74, a difference of 12 per cent—slightly over 12 per cent. Therefore, to take the gross revenue by itself, without recognizing the net operating revenue, was manifestly unfair to Wyoming. I mean that the cost of operation in Wyoming was approximately 12% cheaper than on the system.

I have shown how we arrived at the figure and I believe we took everything into consideration. We took into consideration two of Mr. Balch's three factors and then we took half of the other one and added the net operating revenue to it to get the total. I examined and familiarized myself with the theory that he presented. I can not see that it is a fair method. We took it all and considered it. We used the value of the miles of main line track in Wyoming of the plaintiff as compared to the value of the main track of the system as one of four factors. The value that we put on a mile of main line of plaintiff's road in Wyoming was $28,313.00 and some odd cents. The figure presented as the average mile value for the system was $44,360, I think. We used the factor, "gross operating revenue," only in combination with the net operating revenue. Our reason for not using gross operating revenue as a factor was that from our investigation, we found that operations in Wyoming were approximately 12% cheaper than

on the system. We did not use net operating revenue as a factor except as in conjunction with the gross.

We accepted the value as figured out by the plaintiff for the whole system. We accepted two of the factors that they presented and half of the other one and, as to that, we added one factor to balance the account as we thought fair for Wyoming.

24% or approximately 24% of all the freight of plaintiff in Wyoming is non-revenue freight. That is, freight transported by plaintiff, such as ties and coal for the benefit of the other states. The percentage of such freight on the system is approximately 16%, making a differential [fol. 110] of about 8%, and Wyoming operations transporting about 8% more non-revenue freight.

In determining the value of plaintiff's property in Wyoming, the Board always considers its franchise as a part of the value of the system. The fact that it is not listed separately, does not mean that we do not consider it in determining the value of its properties in Wyoming.

The first figure, $7,989,587, that the State Board arrived at, is what we considered as an equalized value with other property in the state of a like character, that is, other railroads.

(Thereupon the witness testified about the figures appearing on page 5 of defendants' Exhibit No. 1, which testimony is omitted for the reason that the same appears in defendants' Exhibit 8, hereinafter set forth in full.)

After the plaintiff, through its representatives, appeared before the State Board of Equalization on July 9, 1931, and presented objections to the value of its property, and in response thereto, the same was lowered by the Board, no further objections were made to the valuation as fixed prior to the time of the filing of this lawsuit.

Plaintiff, in other years, objected to the amounts fixed by the State Board of Equalization on its properties in Wyoming, and at the time of presenting their objections, urged their theory of how the value should be arrived at. Each time the Board rejected their theory as not fair to Wyoming. I think we have been very fair to the plaintiff. As a matter of fact, we have made concessions after concessions to the plaintiff with reference to valuations. In 1930, return of plaintiff of the physical value of its prop-

erties to the Board for taxation was $8,262,732.00, and the final assessment was $7,970,916. For the year 1929, return of plaintiff as reconstruction new cost less depreciation was $8,274,486 and the assessment was $8,000,757. For 1928 the figures submitted by plaintiff were $8,532,681, and the value for assessment determined by the Board was $8,104,178. For 1927 the amount submitted by plaintiff was $9,517,351, and final assessed value was $7,955,791. The values finally determined by the Board upon which the Board certified the allocated portions of that value to the Counties in Wyoming through which the road of the plaintiff runs, was less each year from 1927 to 1931, inclusive, than the sworn value of the physical properties returned [fol. 111] by the plaintiff to the Board for taxation. There were some remarks attached to the return for each year and the Board considered those remarks in arriving at the taxing value for each year. We examined them and informed ourselves of the nature of the claim. We did not adopt the figures presented in the claim for any of those years for the reason that we did not think it would be fair to the rest of the taxpayers of the state based upon our knowledge of the properties of the plaintiff in Wyoming.

In conformity with the request of the court last night, I have prepared a statement.

(Thereupon the statement referred to by the witness was marked for identification as defendants' Exhibit No. 7, which is in full as follows:)

"The amount submitted on the tax report for 1930 of the plaintiff was $8,281,950.00. This amount was accompanied by the following statement:

The values shown in this report are based upon the estimated cost of reproduction new of the physical properties of the Company in the State of Wyoming, less depreciation, and with the further reference to the market value of the stocks and bonds of the Company or the present earnings of the Company on said properties or the present or future earning capacity or possibilities of such properties.

This amount of $8,281,950.00 is 2.21% of the agreed total value of the Company's property of $375,285,902.00.

The first step taken by the Board of Equalization was to endeavor to reconcile that figure with some recognized authoritative valuation of those values of the physical property owned by the plaintiff. In endeavoring to do so, we took $11,724,126.00, as arrived at by the Interstate Commerce Commission in 1917, which includes the betterments made since. This amount was depreciated at 2.5% per annum for thirteen years, which gives a value of $8,436,076.00 at the present time.

As arrived at above	$8,436,076
Reproduction new less depreciation as submitted by plaintiff	8,281,950

The objection was made by the plaintiff that the $8,281,950 [fol. 112] was the value without regard to the market value of stocks and bonds of the Company or the present earning of the Company on said properties or the present or future earning capacity or possibilities of such properties.

The present earning capacity was next considered by the State Board of Equalization.

The net railroad operating income for the total system is $17,432,850.88. The net railroad operating income for that part of the system in Wyoming was $389,046.22. The latter figure is 2.23% of the former figure. We considered that that would clearly indicate the earning capacity of the property, which percentage of the total value of the system; therefore, $375,285,902.00 × 2.23% would give a value of $8,369,463.00 for that part of the system in Wyoming.

Earning capacity value as shown above	$8,367,463
Average value of the physical property of the plaintiff in Wyoming as arrived at and shown above	8,359,013
As arrived at above	8,436,076
Reproduction new less depreciation as submitted by plaintiff	8,281,950

By means of the above the Board arrived at a value of $8,281,950 as representing the valuation of the physical property depreciated and the sum of $8,369,463 as the earning capacity value.

The next step the Board took was to endeavor to equalize this amount with property of a like nature in the State

of Wyoming, and after thorough comparisons made between the property of the plaintiff and that of the other owners of like property in the State of Wyoming, the State Board of Equalization arrived at the figure of $7,989,-587.00, as being the equalized value of the plaintiff's property within the State of Wyoming.

The plaintiff was notified of this valuation placed on the property by the State Board of Equalization and made objections to the same and appeared before the Board on July 9, 1931. The State Board of Equalization taking cognizance of that objection endeavored to arrive at a figure that they could justify under the circumstances and yet which would give the plaintiff a certain amount of relief.

[fol. 113] Believing that the net operating revenue is an essential figure in determining the value of a system, we took the ratio that the net operating revenue in Wyoming has to the net operating ratio of the system for the last five years, adding the same together and dividing by 5, we arrived at an average ratio of 2.114% as being an average of the net operating revenue in Wyoming to the net operating revenue of the whole system.

	Net Operating Revenue
1926	1.46%
1927	2.41%
1928	2.45%
1929	1.98%
1930	2.27%
Total divided by	5)10.57%
Average	2.114%

We next took into consideration the proposition as put before the Board by the plaintiff in trying to arrive at a figure in somewhat the same manner that they had adopted. Since traffic units and the use of rolling stock apply only according to our contention to the rolling stock valuation and not to the balance of the property we, therefore, take these two factors as presented to the Board by the plaintiff, to-wit:

The rolling stock represents 23.6% of the total value of the property, as submitted by the plaintiff.

Therefore we have:

Traffic Units as submitted by the plaintiff	1.58%
Use of Rolling Stock as submitted by the plaintiff	1.64%
Divide by	2)3.22%
This is the ratio	1.61%

that should apply to that portion of the value represented by the rolling stock.

23.6% of whole value is represented by rolling stock
76.4% value balance of value

100.0%

2.13% is the ratio of equalized value as found by the Board to-wit, $7,989,587.00 to the value of the total system to-wit, $375,285,902.00.

[fol. 114]

Traffic units as submitted by the plaintiff	1.58
Use of Rolling Stock as submitted by the plaintiff	1.64
Divided by	2)3.22
Gives an average ratio of these two factors of	1.61
23.6%×1.61%	.37996
76.4%×2.13%	1.62732
100.0%	2.00728
Ratio of operating income	2.23
Divided by	2)4.23728
	2.11864

giving us a ratio of 2.11864% for the property of the plaintiff in Wyoming, which corresponds very closely with the ratio that we arrived at by using the net operating revenues as shown above.

This convinced us that a value based on these percentages of the whole value could be justified. The operation of the

Board was to endeavor to reconcile this percentage to the formula which the plaintiff had submitted to the Board.

This was done in the following manner:

Traffic Units	1.58%
Average between gross and net operating revenues	1.89%
Use of Rolling Stock	1.65%
Main Track mileage	3.29%
Divided by	4)8.41%
Average	2.1 %

By so doing accepting two of the factors proposed by the plaintiff, averaging the gross operating revenues as proposed by the plaintiff with the net operating revenue as factor three, and adding the factor of mileage of main track in Wyoming. The two factors as proposed by the plaintiff being traffic units, 1.58%, and use of rolling stock, [fols. 115 & 116] 1.65%. In averaging the net and the gross operating revenues we have accepted the other factor as proposed by the plaintiff as forming one-half of this combined factor."

This statement shows the method and factors used by which the Board arrived at the ratio of 2.1% to be applied to the total value of $375,285,902, being the value of the total property of the plaintiff, and is in accordance with my evidence yesterday.

(Thereupon was introduced defendants' Exhibit 8 which follows in full.

[fols. 117 & 118] DEFENDANT'S EXHIBIT 8

All percentages used, unless otherwise explained, represent the ratios of the relationship of the figures in any given account between Wyoming on the one hand and the System on the other hand for valuation taxation purposes.

Accounts	System	Wyoming	Ratio of Wyoming to system	Amount of Wyoming as per ratio
Operating Income:				
Railway operating revenues	$130,030,473.89	$1,905,059.55	1.42%	$5,329,059.80
Railway operating expenses	101,091,423.69	1,248,919.80	1.24%	
Net operating revenues	$ 28,939,050.20	$ 656,139.75	2.27%	8,518,990.00
Credit Accounts:				
Rent from locomotives	112,187.17	1,615.49	1.44%	
Rent from passenger-train cars	482,691.45	2,703.07	.56%	
Rent from work equipment	44,083.97	1,463.59	3.32%	
Joint facility rent income	190,163.07		.00%	
Sub Total	29,768,175.86	661,921.90		

Debit Accounts:				
Railway tax accruals	8,462,677.16	164,760.44	1.95%	
Uncollectible Railway revenues	21,346.03	1,544.35	7.2 %	
Hire of freight cars—debit balance	2,744,730.45	101,244.18	3.32%	
Rent for locomotives	107,463.96	1,547.48	1.44%	
Rent for passenger-train cars	537,353.51	3,009.18	.56%	
Rent for work equipment	5,122.11	170.05	3.32%	
Joint facility rents	456,631.76	600.00	.13%	
Total operating expenses, taxes and rentals.	$ 12,335,324.98	$ 272,875.68		
Net railway operating income	17,432,850.88	389,046.22	2.23%	8,368,463.00
Interest on funded debt	16,241,372.31	539,213.56	3.32%	12,459,492.00
Net railway operating income, less interest on funded debt and before deducting dividends	1,191,478.57	—150,167.34		
Credit Items of non-operating income:				
Income from lease of road	2,748.31		.00%	

Miscellaneous rent income	723,108.12	16,468.54	2.27%
Miscellaneous non-operating physical property	26,050.50		.00%
Dividend income	3,112,734.00	103,342.77	3.32%
Income from funded securities	1,821,835.74	60,484.95	3.32%
Income from unfunded securities and accounts	1,585,659.06	52,643.88	3.32%
Release of premiums on funded debt	24,044.14	798.26	3.32%
Miscellaneous income	390.25	12.96	3.32%
Total non-operating income	7,296,570.12	233,751.36	
Gross income	8,488,048.69	83,584.02	
Debit Accounts:			
Rent for leased roads	3,943.50		.00%
Miscellaneous rents	15,692.35	66.00	.42%
Miscellaneous tax accruals	28,417.57		.00%
Interest on unfunded debt	71,988.44	2,390.02	3.32%
Miscellaneous income charges	25,815.88	647.73	3.32%

Total deductions	145,857.74	3,103.75	
Net Income	8,342,190.95	80,480.27	
Dividend appropriation of income	7,905,208.00	262,452.91	3.32%
Balance income (or loss)	436,982.95	—181,972.64	
Total expenditures for additions and betterments (Capital account)	11,492,581.74		
Total expenditures for additions and betterments (Not including equipment) (Capital account)—Wyoming		Cr. 194,678.34	

If the value of the property of the plaintiff in Wyoming is to be based on a percentage of the value of the plaintiff's entire property. Then judging from the above account there can be only one answer to the question in the plaintiff's mind of the value of that part of the system in Wyoming and that is 3.32% of the entire value or

3.32% × $375,285,902. = $12,459,492. for the year 1930 and $7,881,004. is note quite 63.3% of that value.

[fol. 119] Defendants' Exhibit 8 is a duplicate of the statement made by the plaintiff in the tax report for the year 1931, contained on Sheet 5, with the ratios that the Wyoming figures bear to the figures of the system, and what those ratios, if applied to the whole value of the system, would make the property of the plaintiff worth in Wyoming. The only exception from being a straight copy of that is that I have put in the net operating revenues, which are not shown in the statement, but which are shown in the report to the Public Service Commission, at its proper place.

The percentage of 3.32, if used as the factor in allocating plaintiff's operative properties to the State of Wyoming, would make a value of $12,459,492.

If a uniform percentage of 2.1 with reference to the charges and credits to Wyoming were used in this statement instead of the 3.32, it would leave a final net credit balance of $44,560.00 instead of the $181,972.64 deficit.

By using the percentage 3.29, being the ratio of main line track miles of the plaintiff in Wyoming as compared with the system as the only factor, the value of plaintiff's operative properties in Wyoming for 1931 is shown to be $12,316,906.18.

Defendants' Exhibit No. 1 is the tax return for the year 1931 filed with the State Board of Equalization by plaintiff's officials on form sheets furnished for the purpose. Each of the returns for the years 1927, 1928, 1929 and 1930 were made by plaintiff upon the same kind of forms.

The plaintiff in using traffic units or rolling stock, does not take the question of non-revenue freight on the Wyoming line into consideration. The ratio of the non-revenue freight to the full amount of freight carried is 24.4% in Wyoming and only 16.2% on the system. There is a difference of a little over 8% of the traffic that is not accounted for by the plaintiff in its method of allocating values to Wyoming, which was one of the reasons why the board declined to determine values upon the method which the plaintiff suggested for Wyoming. In determing the value of plaintiff's properties for taxation in Wyoming, the Board used the percentage 3.29, ratio of the mileage as one of four factors as explained in defendants' Exhibit No. 7.

I have figured out the relationship between the tax ac- [fol. 120] cruals and the net operating revenue both for the

system and for Wyoming. In Wyoming it is 25%, not going into the fraction, and for the system it is 29%. According to the figures in the tax return of plaintiff, it requires of plaintiff's funds, 4% less to pay taxes in Wyoming than it does on the system as a whole, in round numbers.

Cross-examination:

The figure 2.57 appearing on defendants' Exhibit 8 in the next to the last column in the third line should be 2.27. The fact that the plaintiff's property in Wyoming, is, in effect, a branch line, and the fact that the State of Wyoming does not receive a credit as far as the North Western System is concerned for the haul across the state into the state on one side and out on the other is one of the factors that enters into the injustice of using traffic units and use of rolling stock as two out of three factors to allocate the value to Wyoming.

I do not think we have taken into consideration as a factor the fact that plaintiff's line in Wyoming is a branch line, and therefore, the state does not get the benefit of trans-state traffic. But this is one of the reasons why we object to the factors as presented by the plaintiff—both traffic units and use of rolling stock. We object to these factors for various reasons as I have explained this morning relative to non-revenue freight. There are various reasons why we object to taking those factors altogether.

We have figured out a relationship of what the traffic units and use of rolling stock, used as factors, should be, if you take into consideration the fact that plaintiff's line in Wyoming is a branch line.

I consider the franchise of plaintiff in this case is the right-of-way. The franchise is taken into consideration in the return made by the plaintiff. We naturally have to consider all of the factors as presented by the plaintiff. The system value of all of plaintiff's operating property, including all of its franchises, enters into it. The franchise was taken into consideration only in the same relationship as the plaintiff has submitted.

The first step that was taken in the process of valuing plaintiff's property in this case, was before the hearing. This was taken by me by the order of and with the consent [fol. 121] of the Board. I mean the details of working it out. I took as one factor, the percentage 2.23. This is the

relationship of the net operating income in Wyoming to the net operating income of the system and producing a value of $8,369,463.00.

I think the ratio of 2.21 was just to show the ratio of the value of plaintiff's physical properties as contained in its return for 1930 to the value of the whole system. It represents the ratio of the reproduction new cost less depreciation of the property in Wyoming to the accepted value of the whole. In our four factors, we took traffic units, 1.58, as one of our four factors. We accepted this factor under our formula, not under theirs. We also used the factor, 1.64, use of rolling stock. We also used a composite of the gross and the net revenue. The gross revenue factor, as reported by plaintiff, was 1.466. The percentage of the net operating revenue is 2.27 for the year 1930. As to whether I took as a factor a percentage on a one year basis and as the other factors, percentges on a five year basis, I would have to look that up. It may be so. If the net revenue for the five years is 2.114 instead of 2.27, I might use the factor for five years in determining this composite revenue factor. You must understand this was all done in a hurry to get out the statement to the plaintiff of what the Board had arrived at. Let us substitute the five year period to get it down to that basis, which can easily be done. By using 2.114 as the net revenue factor, adding 1.46 and dividing by 2, the composite factor would be 1.79 instead of 1.89. If that ratio which I fixed at 1.89 in defendants' Exhibit No. 7 is in fact and should be 1.79, then the final factor would be 2.08 and lower than it is in the exhibit, but the Board accepted the figures in the exhibit. I added the fourth factor of 3.29 and then got 8.30 and divided by 4 and got 2.075.

I have not figured out the increase in value by using the factor, 3.29% of miles of road. But I figured two or three other ways to show that the 2.1% is a fair figure to use, namely the earning capacity of the road. So the alteration of this particular one would make very little difference in a complete survey of the whole matter. The fact remains that on an earning basis, the valuation should be $8,300,000, and the some odd dollars.

Examination by the Court:

In arriving at the percentage factor, an average between gross and net operating revenues, I took the net operating

[fol. 122] revenue for the year 1930. It so happens that the gross operating revenue for the year 1930 is 1.463, and if I remember correctly, it is 1.46, on an average for the five years. They were the same for both the one year and the five year average. I could take either. I took the net operating revenue for the year 1930 in arriving at the factor, 1.89, and this is based exclusively upon returns of the plaintiff for the year 1930 and not upon the five year average. I used the five year average of net operating revenue as shown on the second page of defendant's exhibit No. 7, as proof to verify my figure. But in that operation where I used the four factors, I used the company's factors for a five year period, and I used my composite of net and gross revenue for a year period only.

The only three factors presented by the plaintiff for taxation were tra-fic units, rolling stock and gross operating revenue.

F. CHATTERTON, a witness produced on behalf of defendants, testified:

I am a member of the Wyoming State Board of Equalization and Public Service Commission. I have been such member since March 1, 1927. The general duties of the Board of Equalization are to value certain property for taxation, advise the county officials connected with taxation as to matters relative to their duties and attemping to equalize the values of the property as between counties. The Public Service Commission has charge of all of the utilities in the state relative to making rates and also has charge of fixing intrastate railroad freight rates, and it appears before the Interstate Commerce Commission in connection with interstate rates.

The return of empty cars engaged in the transportation of petroleum and its products is one of the elements that enters into the fixing of the freight rate for its transportation. It is part of the cost of operation, and that is one of the factors that enters into the base of fixing the rates.

With reference to intrastate rates, the evidence is always introduced before us as to all of the operating costs, and all of the factors that enter into the base for making a rate and the cost of the operation and return of the empties is

[fol. 123] one of the factors and is always considered and increases the rate that is allowed for the transportation of the commodity itself.

I have been admitted to practice as an attorney before the Interstate Commerce Commission and am also a member of the association of practitioners before the Interstate Commerce Commission and have appeared before them in the presentation of evidence and in arguments on interstate freight rate matters. The cost of the operation and return of the empties is one of the factors in fixing the rate on interstate traffic, and I know that because we have had several interstate freight rate cases before the Interstate Commerce Commission regarding the rates to be charged for the shipment of petroleum and it products from Wyoming into other states.

C. F. Balch, recalled in rebuttal in behalf of plaintiff, testified:

I heard the testimony of Mr. McWhinnie and have had access to a typewritten transcript of his testimony. I have attempted to work out the ratios used by Mr. McWhinnie and have a partly typewritten and partly pencil exhibit showing those matters.

(Thereupon plaintiff's Exhibit W was marked for identification, which is as follows:)

Plaintiff's Exhibit "W"

1. Net railway operating income in Wyoming 2.23% of	$375,285,902.00
McWhinnie	$ 8,368,463.00
Should be	8,368,876.00
2. Equalized (95.46%)—	7,989,587.00
5 year average of net railway operating income is 1.98% (Totals)	7,430,660.86
1.96% (5 Items)	7,355,603.67
3. 5 year average of net revenue (McWhinnie—O. K.)	2.114%
4. (a) Reported value	8,281,950.00
(b) Value of entire line	375,285,902.00

(a) divided by (b)—2.206% (not 2.1%)

Show that ratio of $8,281,950 & $669,198,216 is 1.24% (not 2.1%).

[fol. 124]

	McWhinnie	Revised	
Ratio (See 4) physical value	2.20 %	1.33	
Five year average net revenue	2.114	2.114	
Total of 2	4.314	3.444%	
Average of 2	2.16	1.722	
Ratio of physical property	1 year only	2.20	1.33
Ratio of Net Ry. operating income	1 year only	2.23	2.23
		4.43	3.56%
Average		2.215	1.78%
5% Average gross revenue (5 yrs.)	1.446%		
% Net revenue (5 yrs.)	2.114		
Total of 2	3.580		
(a) Average of 2	1.89(Order)	1.79%	
(b) % Traffic units (5 yrs.)	1.58	1.58	
(c) % Rolling stock (5 yrs.)	1.64	1.64	
(d) % Miles of road (5 yrs.)	3.29	3.29	
	8.40	8.30	
Average of 4	2.10	2.075	
Sum of (a) plus (b) plus (c)		5.01	
Average (omitting miles of road)		1.67 %	
Difference caused by including miles of road %		.43	
Effect of including miles of road .43% of $375,285,902		$1,613,729.38	
Increase in tax		34,533.81	

	McWhinnie	Revised	
6th % Physical property (1 yr.)	2.20%	2.20%	1.33
% Net operating income (1 yr.)	2.23	2.23	2.23
% Rolling Stock (1 yr.) 1.42			
% Traffic Units (1 yr.) 1.54			
2.96 Divided by 2	1.46	1.46(1.48)	1.48

[fol. 125]

% Gross Revenues	1.46	1.46	1.46
	7.35	7.35	6.50
Divided by 4	2.14	1.8375	1.625
% Physical property (1 yr.)	2.20%		
% Net Ry. operating income (1 yr.)	2.23		
% Gross operating revenue (1 yr.)	1.46		
% Traffic units (1 yr.)	1.42		
% Rolling stock (1 yr.)	1.54		
Footing	8.85		
	1.85		
Divided by 4—	2.14	2.21%	
Divided by 5—		1.77	
2.14% minus 1.77%—		.37	
37% of $375,285,002—		$1,388,557.84	
Tax on 1,388,557.84		29,715.14	
1.77% of $375,285.002.—		$6,642,560.47	
7th % Traffic units	1.42		
% Rolling stock	1.54		
	2.96		1.48 %
Increased by 26%	(?) 1.865 %		1.865%
142%×1.26—	(?) 1.7892		
% Rolling stock	(?) 1.54		
% Net Ry. operating income	(?) 2.23		
Footing	(?) 5.5592		
Average (5.5592 divided by 3)	1.8531		1.8531%
Assessed value	(Item 7)	$7,881,003.94	
1.865% of $375,285,902—		6,998,882.07	
Difference		$ 882,121.87	
Assessed value	(Item 7)	$7,881,003.94	
1.7892% of $375,285,902—		6,714,615.36	
Difference		$1,166,388.58	
Assessed value	(Item 7)	$7,881,003.94	
1.85% of $375,285.902—		6,942,789.19	
Difference		$ 938,214.75	

[fol. 126] Plaintiff's Exhibit W is a memorandum endeavoring to set up in short of a chart an analysis of that testimony that I have made.

I make the amount $400,000 less than Mr. McWhinnie made it by taking the valuation of the Interstate Commerce Commission of 1917 and depreciating betterments thereto at the rate of 2½% per annum.

I find the amount arrived at by using the ratio 2.23% of the physical value of plaintiff's property as reported in its tax return in 1931 about $400 more than the amount arrived at by Mr. McWhinnie.

If we take the five-year period instead of the one-year period and adding the percentages for each year and dividing by 5, we get 1.96% and then if I add the five-year base figures together for Wyoming and the entire line and divide the total into the total of the five years, I get 1.98%. In arriving at the 1.96, follows the method that Mr. McWhinnie used generally in arriving at these averages. Whichever one is used takes the place of the percentage, 2.23, he arrived at.

I checked the item of the five-year average, 2.114 and agree with Mr. McWhinnie. That percentage is correct taking into account the figures that he used.

He used $8,281,950 in connection with the $375,000,000 to derive the percentage ratio of 2.206. The first figure is cost less depreciation as he testified and the second one is value based upon the market value and capitalized income. No possible ratio that would have an intelligent meaning could be obtained by combining those two figures.

I have shown in this exhbit the factors which were used by Mr. McWhinnie as he testified to yesterday in making up the average of 2.1. Taking the first item of gross revenue, which is a five-year average, which I make 1.466, but Mr. McWhinnie used 1.46, and the net revenue for a five-year period, 2.114, and adding the two together, we get 3.58 and an average of the two, he gets 1.89, whereas, the correct division is 1.79.

1.89 is one of the factors that was used in fixing the value by the State Board of Equalization in its order, plaintiff's Exhibit A.

[fol. 127] Mr. McWhinnie got the 3.58 by the combination of the gross revenue percentages for five years with the

net revenue percentages for five years, and those figures are 1.466 plus 2.114% making an average of 1.79 instead of 1.89.

Mr. McWhinnie combined with the 1.89, as obtained by him, with the average for five years of traffic units, 1.58, with the rolling stock average for five years, 1.64, and percentage of miles of road, 3.29, making a total of 8.50, which he divides by 4 and gets 2.1, whereas, it should be 2.125.

This should be 8.40. Dividing by 4 gives 2.1. His division is correct.

By taking the correct figures, 1.79, 1.58, 1.64, 3.29—the sum of these is 8.30, and dividing by 4, it is 2.075.

In order to determine the effect of including the factor, 3.29, I have computed the sum of the other three factors, the total of which is 5.01, and an average of 1.67. So that by including 3.29 in the compilation, the percentage increases from 1.67 to 2.1, which is a difference of .43 of 1%. This .43 of 1% applied to the total value of the system increased the assessment to Wyoming by $1,613,729.38, and at the rate of tax paid last year, $34,533.81 in taxes.

I have taken the ratio that he used of physical property which he states at 2.2, but in order to use a ratio to find the true and intelligent ratio between that 8 million dollars of physical value and the 375 million, I have computed the market value heretofore shown on plaintiff's Exhibit R-11, showing the value as appraised by the commission to the market value of stocks and bonds over a period of five years, was 60.3. That is to say that the property as appraised physically on a cost basis was selling on the market at 60.3c on the dollar. Computing the value of the 8 million so as to get a figure to compare intelligently with the 375 million, I arrived at the value, $4,994,015.85. The ratio of this to the value of the entire line I make 1.33 instead of 2.2. The net operating revenue factor for one year, as used by Mr. McWhinnie, is 2.23. The rolling stock for one year is 1.42, traffic units for one year, 1.54, added together and divided by 2, Mr. McWhinnie states to be 1.46, but correctly divided, is 1.48. The other item, gross revenue, 1.46, is correct.

His footing that I make from his figures is 7.35, which, [fol. 128] divided by 4, as he did, would give 2.14, but correctly divided by 4 gives 1.8375.

Taking the physical property ratio on a correct basis 1.33 plus the 2.23, the 1.48 and 1.46, and adding them together, the total is 6.50, and dividing by 4, the correct ratio is 1.625, instead of the factor 2.14 obtained by Mr. McWhinnie.

Mr. McWhinnie recited another test by taking each of the five items as enumerated above and instead of combining the rolling stock and traffic units, he used them independently. The total of the five is 8.85, which, divided by 4, gives 2.21, which is used quite frequently and freely through his computations, but the correct division would be to divide the four items by 5, which would give an average of 1.77%.

Taking the 2.14 and comparing it with 1.77 to see what the effect of his computation was, we find that the use of the 2.14, as compared with the 1.77, increases the percentage .37%, and that applied to the 375 million plus would increase the assessed value by $1,388,557.84, and the tax, $29,715.14.

The 1.77 in itself applied to the 375 million would be $6,642,560.47 as the value of the lines in Wyoming computed according to this formula.

By taking the traffic units and rolling stock combined as Mr. McWhinnie said he used them, the average of the 2 is 1.48 and increasing this by 26% to make up for the difference between the traffic received from connecting lines in Wyoming and that of the entire line, would give us a factor, 1.865.

By taking 1.42 traffic units increased by 26%, a factor is obtained of 1.7892. By combining this with the factor 1.54 and the net railway operating income of 2.23 and divided by 3, a factor is obtained of 1.8531.

By the use of the factor, 1.865, to the 375 million, a value of $6,998,882.07 is obtained. By the use of the factor, 1.7892 a value of $6,714,615.36 is obtained, and by the use of the factor 1.85 as a percentage, a value, $6,942,789.19, is obtained.

With reference to the ratios of percentages to which Mr. McWhinnie testified, as derived from the financial statement on page 5 of the tax return, defendants' Exhibit No. 1. The items on lines 1 to 15 are all statements first of the operating revenues, and then the items of expense which [fol. 29] must be paid out of those revenues, and which are

connected with the railway operations. There are some figures, which Mr. McWhinnie shows on this Exhibit 8 for his first twenty lines, until he arrives at the figure for Wyoming of $389,046.22, which he shows up opposite here as a percentage of 2.23. All of the percentages above there merely represent the relation between the figures for Wyoming the figures for the entire line—none of these were derived by the use of a percentage, they are all statements of charges. I should not quite say that, because, taking the first item of operating revenues, that is an assignment on a mileage basis to all the States, not on a percentage basis, except the mileage traveled by each shipment makes a percentage, of course. Then, the operating expenses are assigned as nearly actually as our formulas permit. Then the rent for locomotives is assigned to States on the basis of the locomotive miles in each State—that is to say, we rent some locomotives down in Illinois or Iowa, and the income from that is distributed to all the States, because we have distributed all of the expense of those locomotives, repairs, and so forth, to the several States, and any credit which comes from their use in this way is distributed to the States correspondingly to the method of distributing the charges. The same applies to the passenger train cars, work equipment, joint facility rent. Then the tax accruals are actually and not on a percentage basis. The uncollectible railway revenues are actual; that is to say, they are assigned just the same as the freight revenues are. Then the rent paid for locomotives for passengers or freight train cars is assigned in the same manner as the rent collected for locomotives and cars. I mean distributed to states in accordance with the use of the states of that equipment. Then we come to the item of $389,046.22. All of the items below that are merely corporate transactions which have nothing to do whatever with the operation of the railroad. They do not enter into any of my computations anywhere nor any of Mr. McWhinnie's computations up to the point where he adopts 3.32% and applies it to the value of the entire line.

Company freight is hauled generally along with all other freight and some of the states handle considerable of the company material which is used in other states, and we have endeavored to make a correction at least in part in the operating expenses of the different states by crediting

[fol. 130] to the state which performs the service of hauling company material, that was used in other states, a credit on a ton mile basis to the state performing the service, and a similar charge to the states receiving the service, making quite a considerable adjustment all told in the operating expenses.

(Thereupon were marked for identification, plaintiff's Exhibits X and X-1.)

On Exhibit X-1, I have shown the ton miles debited to Wyoming for fuel. That is, for fuel handled by the other States destined to Wyoming—a very small item of 3,073 ton miles which was hauled through Nebraska. Then, there was other material, such as lumber and all sorts of material, for use on the railroad, on which there was 4,614,056 ton miles performed in the States of Nebraska, in South Dakota, in Iowa, and the other States, the other States being so small that I combined several of them. Now, we have computed the expense of hauling this, using six mills per ton mile for the hauling of fuel, and seven mills per ton per mile for the other freight, making a total of $32,317 as a charge against Wyoming for the service performed by the other States for it.

Now, in the next field below this, I have shown a credit to Wyoming: that is, Wyoming performed in the hauling of fuel, principally oil, 26,278,775 ton miles, which was destined to points in Nebraska, of fuel, principally oil, of which 19,738,763 ton miles was performed for material going to points in Nebraska, and so on, and the other States. The ton miles of other material was 6,722,736 ton miles, which includes ties and lumber and other material destined to points in Nebraska, South Dakota, and other States. The cost of hauling this was computed thus—fuel at six mills per mile, and other material at seven mills, making a total credit to Wyoming of $204,732, and deducting then the debits to Wyoming we have a net credit to Wyoming for handling this company material of $172,415.

This is not included in our revenue accounts, because there was no revenue in connection with it and the adjustment was made through the operating expenses, crediting and charging the several States.

I have shown on Exh. X, now, the amount charged in a similar manner for the years 1927, 1928, 1929 and 1930.

We have done this in an effort to try to correct some of [fol. 131] the increases in the figure of the net revenue among the several states, which is a very unreliable figure as stating the actual truth of operations, and you will notice here that this total credit to Wyoming is practically thirty-three million tons out of the thirty-seven million tons, which Mr. McWhinnie cites as 24 per cent of the total tonnage, and still only 8 per cent more than for the service which is performed by all the states in the entire line. This credit may not be perfect, because we have credited to Wyoming, and charged to Nebraska, company oil destined to points in Nebraska. That same oil may be taken by engines running from Chadron to Casper, and still be returned to point- in Wyoming, but this credit had a decided effect upon the net revenue reported in Wyoming, as well as upon the net operating income, for the year 1930, and that is what I want to get to you.

The percentage used by Mr. McWhinnie in his testimony as to company freight, I think was fair. His difference was only 8% lower than the entire line and credit is considerably more than the difference which he cited. It would more than make that up because Wyoming did not consume its proportionate share of company material because we have no great shops and freight yards in Wyoming. In fact, practically the largest part of the repair work for all the Wyoming line is done in other states, either in Nebraska or Illinois.

In using the factor, "use of *of* rolling stock", as indicated in Plaintiff's Exhibit A, rolling stock used in transporting company freight and non-revenue freight in Wyoming was included in all my computations.

Examination by the Court:

Q. I do not find that?

A. Pardon me, Judge, he does not show that, he shows 1.89, but does not say how he arrived at it.

Q. That is what I was interested in?

A. But in his oral testimony he refers to the combination of the gross and the net, so I have combined the gross and the net, carrying it to the third decimal so as to get it right.

Q. Did you get the figure 1.46 out of his testimony?

A. Not just at that point, but at other places in his testimony, yes.

[fol. 132] Q. As I understood him this morning, and what confused me all yesterday evening, is that he never did use a figure of five years either in regard to the average gross revenue or in regard to the average net revenue, but used the year 1930?

A. If you take the exhibit he filed this morning, the first item is 1.46, on the second page—no, pardon me—on the third page, that is right—he does not show it here, either, he shows 1.89, which I have corrected to 1.79.

Q. How do you arrive at the figure of 3.580 in your computations?

A. Why, by combining—now, take his third page of the exhibit filed this morning, and he shows there 2.11864, which he read in his testimony yesterday as 2.114. That is, I presume, the same figure; I cannot say.

Q. There, I think, is where I was confused. On the second page of the Exhibit 7 appears the average of net operating income for a period of five years, 1926 to 1930, inclusive, and it shows that average to be 2.114?

A. Yes, sir.

Q. That is where he got that figure?

A. What is where I got it, yes, sir.

Q. Where did you get the figure of 1.466?

A. That is the five year average. Just a minute—my Exh. G, down at the lower part of the exhibit, I have shown the percentages for each year of the operating revenues, adding the five years together, and I get 7.33, and dividing that by five I get 1.466, and I think that Mr. McWhinnie agreed with me exactly, because those figures were not challenged at all.

Q. On Your Exh. G?

Mr. Rose: What line, Mr. Balch?

A. It is on lines 15 to 19, down in the column marked (3) in the lower field.

Q. Yes, but what shows on my copy of Exh. G, in that third column representing operative revenue for 1930, represents 1.46?

A. Yes, sir.

Q. I do not see anywhere where the general average is used?

A. Well, I computed the general average from——

[fol. 133] The Court: Then, it is not there?

A. Not the figure 1.46, but I computed it from those figures.

Q. That is what I was asking you.

A. Pardon me, I did not understand.

My first suggestion is that there has been an error in mathematics by which a decimal figure of 1.89 has been arrived at as having been used by Mr. McWhinnie where it should have been 1.79. An additional complaint in regard to the use of that figure is that the net operating revenues should never be used as a figure in making valuations. I make no complaint that a five year average on the matter of gross revenues and net revenues was not used. A five year average on both of these was used.

The second complaint is because of the use in any form of the net revenue as a computing basis.

The other element if which I complain is the inclusion of mileage as a basis. My theory is that three elements or factors, traffic units, rolling stock and gross revenue should be used in allocating the valuation to Wyoming.

Direct examination continued:

The net railway operating income for Wyoming in the year 1930 was $389,046.22. However, that does not represent the cash transactions of the company in the State of Wyoming, or the commercial business of the railroad, and in order to get a figure that will reflect the cash situation and the results of the commercial activities by deducting a credit for hauling company material in the sum of $172,-415, leaves as the cash growing out of these activities in Wyoming $216,631.22. That represents 1.24% of the net railway operating income of the entire line. Whereas, Mr. McWhinnie has used 2.23% all through his computations and has insisted that that represented the earning power of the railroad although it contained this $172,000 of credit which was not cash at all. It was a credit for the hauling of company material.

By taking the net operating income for the entire line for 1930, 17 million plus, we find that for each dollar of operating revenue, there was left, after paying all of the expenses of operation, 13.4c, and in the State of Wyoming out of all of the revenues there was remaining for each [fol. 134] dollar of its revenues, 11.3c. The operating

ratio, as Mr. McWhinnie cited, was taken from the relation of the figures including the credit of $172,415, which would change the percentage relative to the net railway revenue which he took as 2.27 and would bring it to about 1.71. His percentage of 2.23, by the change, is brought to 1.24. My position is that in the manner in which I have assigned all of the net operating income to the several states, I have made a more just and equitable distribution of the final income for the purpose of taxation and for the study of a board of this character than these figures themselves, as reported in the annual reports to the several states referred to.

Cross-examination:

I do not mean that I have some other method of assigning revenue than that reported to the State Board of the annual return. I furnished the Board a just method in my exhibits. I used a different report and a more just method in distributing the income than that reported in the report to the railway commission.

I object to the use by the Wyoming Board of Equalization of the factor of miles of line operated in determining the value of plaintiff's property in Wyoming for taxation in the manner in which they used it. I have shown the use of the miles of road in my exhibits, J-1 and J-3, to compute the value in Wyoming, and I think, intelligently.

I take the miles of line of the entire line and then I find the value of a mile of line in Wyoming by using the relation that its characteristics are of an average mile of the line. I did not use 3.29 as a percentage. I never used this as one of the factors on a percentage basis in determining the value of plaintiff's property in a state for taxation. We have not for several years used other than the three factors presented here. Those three factors are the ones which we have been standing on for about seven years, and we have stood on them in the courts and other places where they can be used. We used transportation train miles in Dakota earlier than 1926, but I can not tell when. We used transportation train miles as a factor in Nebraska in 1921. I can not tell the other factors used without looking it up. We use as many as six factors in determining values. I presented in Nebraska all of the factors that we knew and in the use of those factors and in combating

criticism against those factors, we have learned which are [fol. 135] good and which are not good, and we have discarded those which are not dependable for our purpose and are not dependable by anybody.

I am using factors that I know I can depend on. I presume I made an affidavit in the case of the plaintiff against W. L. Osborne, Jr., Tax Commissioner of Nebraska, Docket 863, No. 29,413 in the Supreme Court of the United States. In that affidavit I stated that the plaintiff was using six factors to determine value. I have not always adhered to this three-factor proposition. Our experience in Nebraska is what led us to the adoption of the three. The question of determining values of railroad property is not *u*nsurmountable. It requires some thought, some intelligence, some comprehension of data that is before people and available, and is not to be done real easily. It is recognized by the United States Supreme Court as a difficult matter. I am not continually experimenting in that process. My process has stood the tests of the courts in Nebraska and South Dakota. It stood the test in South Dakota in the Evon case. My recollection is that they adopted my traffic units generally. I haven't the case before me.

In determining the percentage of values of plaintiff's property in Wyoming, the factor of non-revenue freight is not included in the traffic units, but the cars used in the hauling of company freight are considered in the rolling stock account.

Mr. McWhinnie is mistaken in his statement that he did not accept my factors because I did not include those elements.

The testimony I have given in connection with the testimony of Mr. McWhinnie relating to his operations, as shown by defendant's Exhibit No. 7 is my analysis of his method and conclusions as to what he did. When I used the term "intelligent ratio," I referred to what would be intelligent in my judgment.

Examination by the Court:

The figure, as used in connection with traffic units, to-wit, 1.58, is my figure as well as that of Mr. McWhinnie. The figure in connection with the use of rolling stock of 1.65 is my figure as well as that of Mr. McWhinnie. While I make it 1.64, I did not challenge it because it was so close.

[fol. 136] The figure that I used for gross operating revenue revenue in relation to business done in Wyoming, is 1.466, as indicated on Exhibit G. The figures total 7.32, divided by 5, give a result of 1.464 so that my theory as to the proper method of valuation of that property would be the sum total of 1.58, 1.65, 1.464. The total of these figures divided by 3 gives an average of 1.56, as quoted throughout my testimony. It is my contention, as a statistician for the plaintiff, that the factor, 1.56, is the figure that should be used in allocating the proper valuation of plaintiff's property in the State of Wyoming for taxation.

Recross-examination:

I have never been in Riverton, Wyoming. I am the statistician of plaintiff. I do not figure taxes. I know something about taxes, but I do not have to figure them. I could not designate individual properties on which taxes are paid.

Be It Remembered that the foregoing cause was instituted in this court by a Bill in Equity filed by the plaintiff, Chicago and North Western Railway Company; that the defendants filed answer to said Bill in Equity; that the cause has been heard upon the issues arising on said Bill in Equity and said answer, and the evidence in support thereof.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement of evidence was duly lodged in the office of the clerk of this court by counsel for the defendants, and notice of such lodgment duly given counsel for the plaintiff, as provided by Federal Equity Rule No. 75 (b), and the court having considered the same, now finds the statement of the evidence, as above set forth, to be true, correct, complete and properly prepared.

Wherefore, the same is hereby approved this 24 day of April, A. D. 1933.

By the Court.

T. Blake Kennedy, United States District Court Judge, District of Wyoming.

[fol. 137] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL.—Filed Mar. 13, 1933

To the Honorable T. Blake Kennedy, United States District Judge in and for Said District:

The above named defendants, Thomas C. Rowley, as treasurer of Converse County, Charles M. Hall, as treasurer of Fremont County, Alta Pearl Massee, as treasurer of Natrona County, D. A. Shoopman, as treasurer of Niobrara County, in the State of Wyoming, being aggrieved by the decree made and entered in this cause heretofore, to-wit, on the sixteenth day of December, 1932, do hereby appeal from said decree to the Circuit Court of Appeals of the United States for the Tenth Circuit for the reasons specified in the Assignments of Error filed herewith, and the said defendants pray that their appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit.

These petitioners further pray that an order be entered fixing the amount of the bond and costs to be given by these defendants upon said appeal.

J. A. Greenwood, Attorney General; Richard J. Jackson, Deputy Attorney General; George W. Ferguson, Assistant Attorney General, Solicitors and of Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Mar. 13, 1933

Come now the defendants, Thomas C. Rowley, Charles M. Hall, Alta Pearl Massee and D. A. Shoopman, the appellants herein, and say that the decree entered in this cause heretofore, to-wit, on the 16th day of December, A. D. 1932, is erroneous and against the just rights of said defendants for the following reasons:

1. The court erred in its finding of fact, "that the quan-
[fol. 138] tity, quality, cost and value of plaintiff's property

located within the State of Wyoming, measured upon the basis of miles of main line tracks, is greatly less than throughout its system, which fact was well known to the State Board of Equalization when it placed the aforesaid valuation on plaintiff's property," for that said finding of fact is not sustained by sufficient evidence.

2. The court erred in its finding of fact that the State Board of Equalization of the State of Wyoming, in arriving at the valuation of plaintiff's operative property in said state for taxation for the year 1931, "adopted and used as a factor the percentage of plaintiff's main line track located in the State of Wyoming, to-wit, 3.29%, without taking into account the fact that plaintiff's property in the State of Wyoming measured on a mileage basis, is and was greatly less in quantity, quality, cost and value than the portion of its operating system located outside the State of Wyoming," for that said finding of fact is not sustained by sufficient evidence.

3. The court erred in its finding of fact that the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track as a factor in determining the value of plaintiff's property located in the State of Wyoming and subject to valuation by the Wyoming State Board of Equalization was without taking into account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system for that according to the evidence introduced and heard at the trial of said action, the said State Board of Equalization of the State of Wyoming took into proper account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system, and said finding of fact is not sustained by sufficient evidence.

4. The court erred in its finding of fact that plaintiff's operative property in the State of Wyoming was substantially and arbitrarily overvalued by the Wyoming State Board of Equalization, for that according to the evidence introduced and heard at the trial of said action, the said Board of Equalization of the State of Wyoming for the year 1931 valued plaintiff's operative property therein for

[fol. 139] taxation not in excess of its actual value, and said finding of fact is not sustained by sufficient evidence.

5. The court erred in its conclusion of law that "plaintiff has no adequate remedy at law," for that plaintiff, under the Statutes of the State of Wyoming, had an adequate remedy at law.

6. The court erred in its conclusion of law that "this court has jurisdiction of this cause on the equity side, and has jurisdiction to grant the equity relief prayed for in plaintiff's bill of complaint," for that the court had no jurisdiction under the pleadings and evidence to grant plaintiff the relief prayed for in its bill.

7. The court erred in its conclusion of law wherein it fixed a different value for taxation on plaintiff's operative property in the State of Wyoming for the year 1931 than that fixed by the Wyoming State Board of Equalization, for that under the uncontradicted evidence introduced at the trial of said action, the said board, in valuing plaintiff's property for taxation, acted in good faith and without fraud.

8. The court erred in its conclusion of law that the use of the percentage of plaintiff's main line track located in the State of Wyoming, of its whole main line track, as a factor in determining the value of plaintiff's property located in the State of Wyoming and subject to valuation by the Wyoming State Board of Equalization constituted and constitutes an arbitrary and unreasonable method and the application of a wholly wrong method and principle of determining the value of plaintiff's property in the State of Wyoming, for that the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track, as used by the Wyoming State Board of Equalization, was and constituted a legal and proper method and factor in valuing plaintiff's operative property in the State of Wyoming for taxation.

9. The court erred in its conclusion of law "that the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track, without taking into account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system, and the

use of said per centage, as a factor in determining the [fol. 140] value of plaintiff's property located in the State of Wyoming and subject to valuation by the said board, constituted and constitutes an arbitrary and unreasonable method, and the application of a wholly wrong method and principle of determining the value of plaintiff's property in the State of Wyoming," for that the use of the percentage of plaintiff's main line track, as used by the Wyoming State Board of Equalization, was and constituted a legal and proper method and factor in valuing plaintiff's operative property in the State of Wyoming for taxation.

10. The court erred in its conclusion of law wherein it used 1.673% as the allocating factor in allocating to the State of Wyoming the percentage of plaintiff's operative property therein, of its entire system, thus making a valuation amounting to $6,278,534.14 as the actual value of plaintiff's said property in the State of Wyoming, and $1,602,468.90 less than the valuation placed thereon by the Wyoming State Board of Equalization, for that it thus employed and used as an allocating factor a percentage contrary to law.

11. The court erred in its conclusion of law "that the plaintiff's traffic units within the State of Wyoming are 1.58% of the whole; that its rolling stock used in the State of Wyoming is 1.65% of the whole; that its operating revenue in the State of Wyoming is 1.79% of the whole; that the average of these three factors is 1.673%, which, applied to the total valuation of plaintiff's property of $375,285,902, makes a valuation of plaintiff's operating property in the State of Wyoming and subject to valuation by said board, of and amounting to $6,278,534.14, which the court finds to be the true actual value of plaintiff's said property in the State of Wyoming, and which is $1,602,468.90 less than the valuation placed on plaintiff's said property in the State of Wyoming by said State Board of Equalization; "and that plaintiff's said property in the State of Wyoming was substantially and arbitrarily overvalued by the said State Board of Equalization," for that it thus employed and used as an allocating factor a percentage contrary to law.

12. The court erred in its conclusion of law wherein it reduced in any amount the valuation of plaintiff's property

in the several counties for which the defendants are county treasurers, for that the several amounts in which the State Board of Equalization had valued plaintiff's property and [fol. 141] certified the same to the several counties for taxation were not in excess of the true and actual value of plaintiff's property therein for taxation.

13. The court erred in its conclusion of law "that the true actual value of plaintiff's said property in said respective counties in the year 1931 was as follows: Converse County, $1,606,908, Fremont County, $1,733,674, Natrona County, $1,925,177, and Niobrara County, $1,012,766; that the total taxes legally assessable for said year upon the valuations aforesaid in the said respective counties are as follows: Converse County, $31,900.34, Fremont County, $38,417.71, Natrona County, $38,002.48, and Niobrara County, $26,002.40; that the amounts of taxes already paid by the plaintiff at the commencement of this suit in the said respective counties are as follows: Converse County, $24,025.36, Fremont County, $28,933.82, Natrona County, $28,621.09, and Niobrara County, $19,583.40; and that the amounts due to the said respective counties from the plaintiff for 1931 taxes upon the total valuation fixed by the court and allocated to the said respective counties are the following, and no more, to-wit: Converse County, $7,874.98, Fremont Count-, $9,483.89, Natrona County, $9,381.39, and Niobrara County, $6,419.00," for that the several amounts in which the State Board of Equalization had valued plaintiff's property and certified the same to the said counties for taxation were not in excess of the true and actual value of plaintiff's property therein for taxation.

14. The court erred in its conclusion of law as to the remaining amount of taxes to be paid by the plaintiff, for that it refused to allow interest thereon up to the date of the payment thereof.

15. The court erred in its conclusion of law that the plaintiff was entitled to any relief under its Bill in said action, for that its Bill should have been dismissed with costs in favor of the defendants.

16. The court erred in its failure and refusal to find in its findings of fact that plaintiff's operative property in the State of Wyoming was of the same and equal value as

that at which all other property of the same class was valued by the Wyoming State Board of Equalization for taxation for the year 1931, for that the uncontradicted evidence introduced at the trial of said action so shows.

[fol. 142] 17. The court erred in its decree where in it sustained, in part, plaintiff's Bill and reduced the amount of taxes to be paid by plaintiff under the valuation theretofore made by the Wyoming State Board of Equalization and certified to the proper officers of the counties wherein its property is situated.

18. The court erred in its decree in that it failed and refused to dismiss plaintiff's Bill, with costs in favor of said defendants.

19. The court erred in its decree wherein it permanently enjoined defendants from collecting or attempting to collect any sums as taxes for the year 1931 upon the property of the plaintiff as valued by the Wyoming State Board of Equalization for said year and certified to the counties wherein its property is located.

20. The court erred in its decree wherein it reduced the amount of taxes assessed against the plaintiff in the counties in which its property is located and ordered that defendants pay the costs of said action.

21. The court erred in its decree wherein it refused to allow interest on the remaining amount of taxes found to be owing by the plaintiff.

Wherefore, defendants pray that the said decree and order of the court may be reversed; and for such other and further relief as to the court may seem just and proper.

J. A. Greenwood, Attorney General of Wyoming; Richard J. Jackson, Deputy Attorney General of Wyoming; George W. Ferguson, Assistant Attorney General of Wyoming; R. Dwight Wallace, Assistant Attorney General of Wyoming, Attorneys for Defendants.

[fol. 143] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL.—Filed March 13, 1933

This cause coming on now to be heard this 13 day of March, 1933, upon the petition of the defendants for an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and the court being fully advised, does hereby grant said petition and allow said appeal, and does hereby fix the sum of Five Hundred ($500.00) as the amount of the bond for costs to be given by said defendants on said appeal.

Dated this 13 day of March, 1933.

T. Blake Kennedy, United States District Judge.

RECITAL AS TO BOND

[Cost bond in the sum of $500, approved by the trial judge, with National Surety Company as surety, was filed in the District Court on March 13, 1933.]

RECITAL AS TO CITATION

[Citation in proper form, directed to appellee, with acceptance of service by counsel for said appellee, was filed in the District Court on March 13, 1933.]

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO DOCKET THE CASE AND FILE TRANSCRIPT.—Filed April 18, 1933

Come Now the above named defendants, by and through their attorneys and solicitors, and respectfully move that this Honorable Court grant an extension of time within which to docket the case and file the record in the above entitled cause on appeal in the United States Circuit Court of Appeals for the Tenth Circuit, to and including the 22nd day of May, A. D. 1933, in order that the clerk of this court may have sufficient time to properly prepare and certify the transcript.

As the cause and necessity for such extension of time, defendants state that because of unavoidable delay in the preparation of the narrative statement of the evidence, such [fol. 144] extension is necessary; wherefore, defendants pray that such extension be granted.

Ray E. Lee, by Oscar O. Natwick, Attorney General of Wyoming; Oscar O. Natwick, Deputy Attorney General of Wyoming; Wm. C. Snow, Assistant Attorney General of Wyoming; J. A. Greenwood, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING EXTENSION OF TIME WITHIN WHICH TO DOCKET AND FILE THE TRANSCRIPT.—Filed April 18, 1933

The matter of the defendants' motion for an extension of time within which to docket the case and file the record in the above entitled cause, on appeal in the United States Circuit Court of Appeals for the Tenth Circuit, coming on for consideration this 18 day of April, A. D. 1933; and it appearing to the court that such extension is necessary for good cause shown, and being fully advised in the premises:

It Is Ordered by the court that the time within which to docket said case and file the record in the United States Circuit Court of Appeals for the Tenth Circuit be, and it is hereby enlarged and extended to and including the 22nd day of May, A. D. 1933.

Dated this 18 day of April, A. D. 1933.

T. Blake Kennedy, Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF LODGMENT—Filed March 13, 1933

To the Plaintiff, Chicago & North Western Railway Company, a Corporation, and to Its Solicitors:

You and each of you will take notice that the defendants, Thomas C. Rowley, as treasurer of Converse County, State of Wyoming; Charles M. Hall, as treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, as treasurer of Natrona County, State of Wyoming; D. A. Shoop-

[fol. 145] man, as treasurer of Niobrara County, State of Wyoming, pursuant to Federal Equity Rule No. 75 (b), have lodged in the office of the clerk of said court for your examination, the condensed statement of the evidence taken on the trial of said cause, and that the said defendants on the 24th day of March, 1933, at ten o'clock A. M. on said day, or as soon thereafter as the same can be heard, will ask the Judge of said court to approve the said statement.

J. A. Greenwood, Attorney General; Richard J. Jackson, Deputy Attorney General; Solicitors and of Counsel for Defendants.

Service of the above notice by copy is acknowledged this 13th day of March, 1933. R. R. Rose, Solicitor and of counsel for Chicago & North Western Railway Company, Plaintiff.

In United States District Court

Request for Leavl to Substitute Charles M. Hall as a Defendant in the Place of and for the Defendant, Charles T. Cole—Filed March 7, 1933

Come Now the defendants and show to the court that since the commencement of this action and during its progress, Charles M. Hall has become treasurer of the County of Fremont, State of Wyoming, as successor to the defendant, Charles T. Cole, and defendants pray that they may substitute the said Charles M. Hall as a defendant in the place of and for the said defendant, Charles T. Cole.

Thomas C. Rowley, Treasurer, Converse County, Wyoming; Charles T. Cole, Treasurer, Fremont County, Wyoming; Alta Pearl Massee, Treasurer, Natrona County, Wyoming; D. A. Shoopman, Treasurer, Niobrara County, Wyoming; by J. A. Greenwood, Attorney General of Wyoming, and Counsel for said Defendants.

[fol. 146] In United States District Court

Order Permitting Defendants to Substitute Charles M. Hall as a Defendant for and in the Place of the Defendant, Charles T. Cole—Filed March 7, 1933

Come Now the defendants and file their application for leave to make Charles M. Hall a party defendant for and

in the place of Charles T. Cole, defendant, as the successor in office of the said Charles T. Cole.

And the Court Being Sufficiently Advised, does now give leave to defendants to substitute the said Charles M. Hall as a party defendant for and in the place of the said Charles T. Cole—the said action to be hereafter entitled in the name of the said Charles M. Hall as one of the defendants therein.

Dated this 7 day of March, 1933.

T. Blake Kennedy, United States District Judge.

In United States District Court

Election as to Printing Transcript—Filed April 24, 1933

Come Now the appellants herein and waives the printing of the record in the above case by the clerk of the District Court of the United States for the District of Wyoming, and elects that the same be printed by the United States Circuit Court of Appeals for the Tenth Circuit.

Ray E. Lee, J. A. Greenwood, Attorneys for Appellants.

In United States District Court

Præcipe for Transcript—Filed April 24, 1933

To Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming:

You Are Hereby Requested to prepare a transcript on appeal in the above entitled case and to include therein the following portions of the record, to-wit:

1. Bill in equity, filed November 7th, 1931.

[fol. 147] 1a. Temporary Restraining order, November 7th, 1931.

1b. Temporary Injunction order, December 28th, 1931.

2. Answer of the defendants, filed January 7th, 1932.

2a. Judge's Memorandum, filed August 30, 1932.

3. Judge's memorandum, filed November 9th, 1932.

4. Findings of fact and conclusions of law and Decree, entered December 17th, 1932.

5. Statement of the evidence, including certificate of approval of statement of evidence, filed April 24th, 1933.
6. Petition for appeal, filed March 13th, 1933.
7. Assignments of error, filed March 13th, 1933.
8. Order allowing appeal, filed March 13th, 1933.
9. Cost bond on appeal, filed March 13th, 1933.
10. Citation to appellees, filed March 13th, 1933.
11. Motion for extension of time within which to docket case and file transcript, filed April 18th, 1933.
12. Order allowing extension of time within which to docket case and file transcript, entered April 18th, 1933.
13. Notice to the plaintiff of the lodging of the condensed statement of the evidence, filed March 13th, 1933.
14. Request for leave to substitute Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.
15. Order substituting Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.
16. Election as to printing of transcript, filed April 24th, 1933.
17. Præcipe for transcript, filed April 24th, 1933.
18. Stipulation for transcript, filed April 24th, 1933.

Ray E. Lee, Attorney General of Wyoming; James A. Greenwood, Attorneys for Appellants.

[fol. 148] Service of the attached præcipe for transcript by copy is acknowledged this 22nd day of April, A. D. 1933.

R. R. Rose, Vincent Mulvaney, Wilfrid O'Leary, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR TRANSCRIPT OF RECORD—Filed April 24, 1933

It Is Hereby Stipulated and Agreed by and on behalf of the above named plaintiff and defendants, by and through their attorneys of record in said cause, that the following portions of the record, as filed in the office of the clerk of the above court, be included in the transcript:

1. Bill of Equity, filed November 7th, 1931.

1a. Temporary Restraining order, November 7th, 1931.

1b. Temporary Injunction order, December 28th, 1931.

2. Answer of the defendants, filed January 7th, 1932.

2a. Judge's Memorandum, filed August 30, 1932.

3. Judge's Memorandum, filed November 9th, 1932.

4. Findings of fact and conclusions of law and Decree, entered December 17th, 1932.

5. Statement of the evidence, including certificate of approval of statement of evidence, filed April 24th, 1933.

6. Petition for appeal, filed March 13th, 1933.

7. Assignments of error, filed March 13th, 1933.

8. Order allowing appeal, filed March 13th, 1933.

9. Cost bond on appeal, filed March 13th, 1933.

10. Citation to appellees, filed March 13th, 1933.

11. Motion for extension of time within which to docket case and file transcript, filed April 18th, 1933.

12. Order allowing extension of time within which to docket case and file transcript, entered April 18th, 1933.

[fols. 149 & 150] 13. Notice to the plaintiff of the lodging of the condensed statement of the evidence, filed March 13th, 1933.

14. Request for leave to substitute Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.

15. Order substituting Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.

16. Election as to printing of transcript, filed April 24th, 1933.

17. Præcipe for transcript, filed April 24th, 1933.

18. Stipulation for transcript, filed April 24th, 1933.

R. R. Rose, Vincent Mulvaney, Wilfrid O'Leary, Attorneys for Plaintiff. Ray E. Lee, Attorney General of Wyoming; James A. Greenwood, Attorneys for Defendants.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—Sept. 25, 1933

Before Honorable Orie L. Phillips, Circuit Judge; Honorable Sam G. Bratton, Circuit Judge, and Honorable J. Foster Symes, District Judge

This cause came on to be heard and was argued by counsel, James A. Greenwood, Esquire, appearing for appellants, Robert R. Rose, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, JANUARY TERM, 1934

No. 881

James A. Greenwood (Ray E. Lee, Attorney General of the State of Wyoming, John J. McIntyre, H. S. Harnsberger, George A. Weedell, Harold I. Bacheller, Thomas O. Miller were with him on the brief) for Appellants.

R. R. Rose (W. T. Faricy, Vincent Mulvaney and Wilfred O'Leary were with him on the brief) for Appellee.

Before Phillips and Bratton, Circuit Judges, and Symes, District Judge

OPINION—January 9, 1934

BRATTON, Circuit Judge, delivered the opinion of the court:

The Chicago and North Western Railway Company, a corporation organized under the laws of the State of Illinois, hereinafter called plaintiff, instituted this action against the respective treasurers of Converse, Freemont, Natrona and Niobrara Counties in Wyoming, hereinafter called defendants, to enjoin them from collecting the full amount of tax levied against its property for the year 1931.

Plaintiff alleged that it submitted a return of its property, subject to tax, containing the information required by [fol. 152] law; that thereafter the State Board of Equali-

zation of Wyoming fixed the value of the property at $7,881,003.94; that such sum was $2,031,433.94 in excess of the actual value of such property; that for more than ten years preceding the institution of the suit, its property throughout the state had been intentionally and systematically valued much higher than property of other taxpayers; that during such period about twenty per cent of the property throughout the state properly subject to tax had been omitted from the tax rolls, and that in consequence of such action plaintiff suffers a discrimination in violation of its rights under the Fourteenth Amendment to the Constitution of the United States, guaranteeing equal protection of the laws. It charged that the tax asserted by the four counties, computed on their respective allocations of such excessive valuation, is: Converse, $40,042.27; Fremont, $48,223.02; Natrona, $47,701.82; Niobrara, $32,639.01; that based upon a valuation uniform with that placed on property throughout the state, the tax due such counties would be: Converse, $24,025.37; Fremont, $28,933.81; Natrona, $28,621.09; Niobrara, $19,583.41; that it had tendered the counties one-half of the respective sums properly due and payable; that it stood ready and willing to pay such other amounts, if any, as and when the court should determine the same to be due and payable, and that unless prevented from doing so, the defendants would restrain and sell its property for the taxes thus illegally imposed.

Defendants challenged the jurisdiction of the court; they denied excessive valuation of plaintiff's property; they asserted that it was valued more than $4,000,000.00 under its actual value, and they denied the alleged discrimination.

Judgment was rendered, reducing the value of the property by $1,602,468.90; the tax was computed on the corrected value; the apportionment was made to the four counties, and defendants were enjoined from enforcing collection of any tax in excess of the amount thus determined to be due.

The first question presented for our consideration relates to the jurisdiction of the district court to grant equitable relief. It is asserted that under relevant statutes of the state (quoted in note 1) a plain and adequate remedy at law is provided. The remedy is to pay the tax, submit to the Board of County Commissioners an application for its

[fol. 153] refund and if that is denied, institute a suit in the district court for its recovery. Recourse to equity cannot be had if there is a plain, adequate, complete and efficient remedy at law. Sec. 384, Title 28, U. S. C. A. Decisions so holding are without number.

The mere illegality of a tax is not sufficient to invoke the aid of a court of equity. In addition to that fact, there must be lack of a plain, adequate, complete and efficient remedy at law. In order to be plain, adequate, complete and efficient, the remedy, by its nature and character, must be adapted and suited to the accomplishment of the end in view. The remedy is not adequate and complete if several suits would be required between the same parties involving identical issues of fact and law. In other words, equity may intervene where a multiplicity of suits at law would be necessary to determine the controversy and to accord parties the rights to which they are entitled. Obviously, four separate actions would be required here, one against the treasurer of each county. The issues of fact and law would be identical, but it is not improbable that different conclusions would be reached, thus injecting uncertainty, confusion and delay into the situation. For that reason, the remedy at law is not adequate, complete and efficient.

While federal courts should maintain a proper reluctance to interfere through use of the writ of injunction or otherwise, with a sovereign state in the collection of its revenues, guided by the considerations enunciated in the settled adjudications in respect of the question, the trial court correctly entertained equitable jurisdiction. Union Pacific R. Co. v. Board of County Commissioners, 247 U. S. 282; Wilson v. Ill. Southern Ry. Co., 263 U. S. 574; Chicago, G. W. Ry. Co. v. Kendall, 266 U. S. 94; Pleasant v. M. K. & T. R. Co., (C. C. A. 10) 66 F. (2d) 842; Roadway Express, Inc. v. Murray, 60 F. (2d) 293; A. T. & S. F. Ry. Co. v. Sullivan, (C. C. A. 8) 173 F. 456.

The case of Matthews v. Rodgers, 284 U. S. 521, upon which defendants strongly rely, is not to the contrary. Plaintiffs there sued for themselves and others similarly situated to restrain the collection of a tax alleged to be void in that it imposed an unconstitutional burden on interstate commerce. It was held that the bill failed to state a cause of action cognizable in equity because as to each

party a single suit brought at law to recover the tax would determine the constitutionality of such tax; that no facts were alleged showing the necessity for more than one suit; [fol. 154] that the alleged unconstitutionality of the law depended upon its application to each of the appellees attended by different business conditions, and in that way presented separate issues of fact and law. The situation is different here. There is an identity of issues, both fact and law. They can be determined in one equitable proceeding, while, as previously suggested, at least four different actions at law would be required with possible divergence of conclusions. Stratton v. St. L. S. W. R. Co., 284 U. S. 530, also stressed by defendants, unlike this case, did not necessitate a multiplicity of suits to recover the tax involved.

We turn now to the other question involved. Plaintiff operates a railway system in the States of Illinois, Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin and Wyoming. In fixing the taxable value of property in Wyoming, the State Board of Equalization considered and used four factors, namely: traffic units, 1.58 per cent; rolling stock, 1.65 per cent; operating revenue, a composite figure between gross and net, 1.89 per cent—admittedly erroneous, the correct figure concededly being 1.79 per cent—and track mileage, 3.29 per cent. Each factor represented the proportion the part in Wyoming bore to the entire system. These sums were added, the total divided by four and that average was the measure finally adopted. The parties agree that the first three factors are correct. No dispute arises from their use. The controversy relates to the fourth. The first three total 5.02 per cent, and their average is 1.673 per cent. Their use, with the fourth eliminated, would result in a valuation of $6,278,534.14. The same method of computation, including the fourth, resulted in valuating the property at $7,881,003.94, thus making a difference of $1,602,468.90.

The court found that the railroad system embraces 8,180.20 miles of main line track of which 278.35 miles are located in Wyoming; but the quality, cost and value of such property within that state, measured by main line track, is greatly less than that throughout the system. That finding is sustained by substantial evidence. Conditions through-

out the system are not substantially uniform. They differ widely. The company owns costly grade separations in Chicago, generally known as track elevations raising the main line grade twelve or fifteen feet above the street level to permit traffic in the streets without interruption. There [fol. 155] are no such elevations in Wyoming. It has stone ballast in other states. There is none in Wyoming. Its bridges in some of the other states are of the expensive stone or stone arch type, while most of those in Wyoming are temporary in character, called pile trestles. Its station facilities in other states, particularly in Illinois, are extensive in capacity and expensive in character. Except for three or four, those in Wyoming are of temporary construction, some being car bodies and platforms. With a few exceptions, the rails used for yard and side track purposes in Wyoming are substantially lighter in weight, and consequently less in value, than those used in other states, notably Illinois, Wisconsin and Iowa. These differences are substantial. There is lack of uniformity in conditions throughout the system.

The so-called track mileage method of fixing value of railroad property for tax purposes, that is to say, ascertaining and fixing the figure which bears the same ratio to the value of the entire system that the miles of track in the state bear to the total mileage of the system, both within and without the state, is an approved method where conditions are fairly uniform throughout the system. State Railroad Tax Cases, 92 U. S. 575; Cleveland etc. Railway Co. v. Backus, 154 U. S. 439; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; A. T. & S. F. Ry. Co. v. Sullivan, supra. But that method is obviously arbitrary and unreasonable and cannot be sustained if conditions within and without the state vary substantially or differ widely. Its application in such circumstances results in taxing property outside the state under a mere pretense. Pittsburgh etc. Railway Co. v. Backus, 154 U. S. 521; Western Union Telegraph Co. v. Taggart, 163 U. S.; Fargo v. Hart, 193 U. S. 490; Wallace v. Hines, 253 U. S. 66.

In view of the court's finding that the parts of the system within and without the state are not fairly uniform, but differ widely, and that finding being supported by substantial and virtually uncontroverted testimony, the use

of the track mileage factor, without making allowance for such differences, was an arbitrary and unreasonable method in fixing the value of the property within the state. It not merely effected an excessive value with a consequent injustice; its effect was to tax property without the state. It amounted to fraud in law, although members of [fol. 156] the Board of Equalization acted without fraudulent or other improper motive. That cannot be upheld. Defendants undertake to sustain the assessment with the argument that the other factors were proper. That fact cannot save them, because it merely reduces the quantum of vice. It still exists. It is plain and by mathematical calculation it can be determined that its presence increased the value placed on plaintiff's property $1,602,468.90. The court correctly reduced the value by that amount, computed the tax on the corrected sum, made the apportionment thereof to the four counties and restrained the collection of any sum in excess of that amount. Accordingly the judgment is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

SYMES, District Judge (dissenting):

I regret I am unable to agree with the court on the one question of jurisdiction. The bill of complaint simply discloses a dispute as to the proper method of arriving at the value of plaintiff's property. The most that can be said is that the method adopted by the State Board of Equalization was illegal. True, fraud and systematic undervaluation of other classes of property are charged, but are [fol. 157] wholly unsupported by the evidence, and were properly found to be without merit. No facts are shown to support the conclusion pleaded, that no plain, speedy, or adequate remedy at law exists, or that great and irreparable loss will be suffered. It is not alleged that plaintiff has tested or exhausted the legal remedies available under the state statutes, or that a multiplicity of suits are probable or possible.

NOTE 1.—"Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer

must be joined in the action." Sec. 89-4202. Revised Statutes, 1931.

"Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officers who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments." Sec. 89-4203.

"In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth." Sec. 115-311.

"District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected." Sec. 89-4201.

Two recent cases in the U. S. Supreme Court, Matthews v. Rodgers, 284 U. S. 521, and Stratton v. St. Louis Southwestern Railway Co., 284 U. S. 530, are decisive. In the former Justice Stone says:

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted fed-

eral right may be preserved without it. Whenever the question has been presented, this court has uniformly held that the mere illegality or unconst-utionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States."

And further, that if there is an adequate remedy at law, it must be pursued. He then examines the law of the state involved (Mississippi), and finds that there is a plain remedy afforded by the applicable statutes of the state.

The Stratton case, supra, (coming up from Illinois), involves the same question. The court finds the existence of a right to recover the tax if illegal or inequitable, and refuses relief, saying, p. 534:

"There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it in the absence of allegations setting up special circumstances which would render the legal remedy inadequate."

These very late cases show the tendency of that court to narrow the grounds of Federal jurisdiction in cases of this nature.

Sec. 115-311, Rev. Stats. Wyo., 1931, makes it the duty of the county commissioners to direct the treasurer to refund erroneous or illegal taxes without suit, and § 89-4201, Rev. [fol. 158] Stats. Wyo., 1931, gives the aggrieved taxpayer a right of action to enjoin an illegal levy or assessment, or to recover back taxes wrongfully exacted or paid. As simple a method as could be asked. See Carton v. Board of Commissioners, 69 Pac. 1013. The good faith of the state officers will be presumed. Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350. So we have a situation where the most that can be contended by the railroad is that the Board of Equalization made an honest mistake in valuing the plaintiff's property. This does not amount to discrimination. Sunday Lake Iron Co. v. Wakefield, supra.

Among the cases cited by appellee is Union Pacific R. R. Co. v. Weld County, 247 U. S. 282. Justice Van Devanter wrote the opinion in that case and in Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481. Both arose in Colorado. In the earlier case, Singer Sewing Mach. Co. v Benedict, supra, he observeed that the revenue laws of Colorado con-

tained a section imposing upon the county commissioners in all cases the duty of refunding to the taxpayer without abatement or discount, any tax interest or costs or any portion thereof, which is found to be erroneous or illegal, and that this by necessary implication, confers upon the taxpayer a correlative and substantive right to have the same so refunded. That this constituted an adequate remedy at law, and therefore relief by injunction was not admissible. Later, when Union Pacific R. R. Co. v. Weld County, supra, came up to the Supreme Court, he found a new statute, the effect of which had not yet been determined by the state Supreme Court, and which might be construed as prohibiting the commissioners from refunding illegal taxes without the approval of the state tax commission, and as withdrawing the right of action referred to; that therefore, the existence of an adequate remedy at law was uncertain and debatable, and equitable jurisdiction and an injunction could not be properly declined.

When we consider the similar Wyoming statute, the simple and complete remedy it affords, and the decisions of the state court, it would seem the Singer Sewing Mach. Co. case, supra, and not the Union Pacific Co. case, supra, is the authority applicable to the facts here. The distinction is clearly pointed out in Greene v. Louisville & I. R. R. Co., 244 U. S. 499, at p. 519.

Sec. 384, Tit. 28, U. S. C. A. (Rev. Stats. 723), forbids [fol. 159] suits in equity, where a plain, adequate and complete remedy exists at law. Justice Stone in Matthews v. Rodgers, supra, says this applies with peculiar force to suits in the Federal court to enjoin collection of a state tax. Admittedly, the only possible ground for plaintiff coming here in the fear that it will have to bring a separate suit against each of the four counties involved.

Pacific Exp. Co. v. Seibert, 44 Fed. 310 (an old case in the Western Dist. of Missouri), affirmed 142 U. S. 339, involved a state tax alleged to violate the Federal Constitution. A penalty of $100.00 a day for each day's delay in payment was provided, recoverable in separate actions. Judge Caldwell, speaking for himself and Judge Phillips, said:

"A very clear case must be made out before a federal court will enjoin the collection of a state tax * * * It must also appear that its collection will be attended with a

multiplicity of suits, or the destruction of a franchise, or cast a cloud upon the title to real estate, or some other recognized head of equity jurisdiction must be shown."

And in speaking of a multiplicity of suits, he said, p. 315:

"It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the state might bring a separate suit for each day's penalty, the court would hardly be justified in acting on the assumption that it would do so. The state is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting for and in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with lawsuits * * * and, until the fact is shown to be otherwise, will act on the assumption that a state will not bring any more suits than are fairly necessary to establish and maintain its rights."

In Equitable Guarantee & Trust Co. v. Donahue, 45 Atl. 583, the chancery court of Delaware, under a state statute similar to the Federal statute, supra, had our question before it. The chancellor, after discussing the origin of this branch of equity jurisdiction, says:

[fol. 160] "is there imminent and threatened a multiplicity of suits of such a nature and between such parties as to satisfy the court that the legal remedies are not sufficient?"

And approves the quotation from the Pacific Exp. Co. case, supra.

In an old case in Massachusetts, Fellows v. Spaulding, 6 N. E. 548, the court was urged to take jurisdiction to prevent a multiplicity of suits, in each of which the same question of law would be present, but declined, saying there is no reason why one suit, the others being continued to abide the result, should not settle all the cases.

In Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, the Supreme Court says it has refrained from interfering in all cases where the Federal rights of the per-

sons could be preserved unimpaired, and discussing the question of multiplicity of suits says, p. 286:

"Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation."

And:

"Perhaps it might be necessary to await the final decision of one action at law." Citing cases.

And Corpus Juris, Vol. 21, p. 74, says:

"While the prevention of a multiplicity of suits is an independent and substantive ground of equity jurisdiction and not merely a makeweight where other equities are present, it does not alone create a cause of action where none otherwise exists;"

The subject is also discussed by Pomeroy, 4th Ed., Vol. 1, beginning at § 243.

In Wilson v. Ill. So. Ry., 263 U. S. 574 (also cited by appellee), Federal jurisdiction was sustained, not only because a multiplicity of suits against the taxing bodies would result,

[fol. 161] "but there would be insuperable difficulty in determining what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties with not improbably different results in each."

Therefore there was no adequate remedy at law.

In the case at bar no such allegations are made, and, as pointed out, the assessment is fixed by one body; there is authority to repay the tax, if illegal, without a suit, which we assume the proper officials would do. In addition the taxpayer has a right of action to enjoin or recover.

Keokuk Bridge Co. v. Salm, 258 U. S. 122, was a suit by a private property holder, and the only question was overvaluation. The Supreme Court denied jurisdiction because

the remedy afforded by the state statute had not been availed of.

The authorities are of course too numerous to mention. In all, the Supreme Court after observing it is only in extreme cases that the Federal court will enjoin the collection of a state tax, proceeds to inquire whether, under the remedy afforded the aggrieved taxpayer, the question can be clearly presented and speedily determined, either in a court of law by an administrative body, or both. If it can jurisdiction is declined. The mere fact that there may be a possibility, as distinguished from a probability of more than one action being required, does not alter the rule.

Following appellee's argument to its logical conclusion, appellee could have its tax controversies passed upon by the Federal court merely because its railroad ran through four counties in Wyoming, while another railroad with the same grievance, whose line traversed only one county of the same state would be denied Federal jurisdiction. Federal jurisdiction does not depend upon any such fortuitous circumstance.

The method of valuation adopted was illegal and should be condemned. I doubt, however, the right of the court to determine the method to be followed in arriving at a valuation, or in actually fixing the figure. This is an administrative and not a judicial function. The constitution of Wyoming, Art. 15, § 11, provides, that all property, except as in this constitution otherwise provided, shall be uni- [fol. 162] formly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal and, admittedly, an honest but mistaken effort to do this was made. It is still the duty of the board to make the valuation and, according to the authorities, they can use the rejected mileage basis as a factor, if proper allowance is made for the difference in value between a mile of track in Wyoming, and that of other parts of the system; or the board may adopt a method other than that adopted by the lower court, provided it secures a just valuation.

Pleasant et al. v. Missouri-Kansas-Texas R. Co., 66 Fed. (2d) 842 (C. C. A. 10th), was a suit to enjoin collection of state taxes. It was held that courts do not supervise the actions of assessing bodies, or sit to correct their errors of judgment.

The State Railroad Tax Cases, 92 U. S. 575, is a leading case. Justice Miller there says that while they do not lay down any absolute limitation of the power of a court of equity to restrain the collection of illegal taxes; that if the grievance can be remedied by a suit at law, either before or after the payment of taxes, a court of equity will not interpose by injunction to stay collection of the tax (p. 614); and goes on to say that the court has no power to apportion the tax, to make another assessment, or to direct another to be made by the proper officers; that these officers, and the manner in which they exercise their functions, are wholly beyond the power of the court. And further on: that while a court of equity may enjoin a tax complained of in whole or in part, it has not the power of doing complete justice by making, or causing to be made a new assessment on any principle it may decide to be the right one.

See also Ex parte State of Oklahoma, 37 Fed. (2d) 862 (C. C. A. 10th).

It would therefore seem that under the rule of the Stratton case, supra, no special circumstances are shown that render the legal remedy inadequate.

December 28, 1933.

[fol. 163] In United States Circuit Court of Appeals

Decree—Jan. 9, 1934

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable George T. McDermott, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed, and that Chicago and North Western Railway Company, a corporation, appellee, have and recover of and from Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming; Charles M. Hall, as Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, as Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, Treasurer of Niobrara County, State of Wyoming, appellants, its costs herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed Feb. 7, 1934

Come Now the above-named appellants, Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming; Charles M. Hall, as Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, as Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, as Treasurer of Niobrara County, State of Wyoming, and present this, their petition for a rehearing of the above-entitled cause, and most respectfully state that this Honorable Court erred in its decree herein, dated January 9th, 1934, wherein and to the extent that it affirmed the judgment of the lower court of November 9th, 1932, and as grounds for such error here complained of, respectfully show:

1. That the Federal District Court did not have equitable jurisdiction of this cause.

2. That the pleadings and facts do not warrant the granting of injunctive relief herein.

[fol. 164] 3. That the evidence is not sufficient to justify the granting of any equitable relief.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the lower court be reversed.

Respectfully submitted, Ray E. Lee, Attorney General of the State of Wyoming; John J. McIntyre, County and Prosecuting Attorney, Douglas, Converse County, Wyoming; H. S. Harnsberger, County and Prosecuting Attorney, Lander, Fremont County, Wyoming; George A. Weedell, County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Harold I. Bacheller, Deputy County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Thomas O. Miller, County and Prosecuting Attorney, Lusk, Niobrara County, Wyoming, Attorneys for Appellants. James A. Greenwood, Cheyenne, Wyoming, Special Counsel for Appellants.

Certificate of counsel omitted in printing.

[fol. 165] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Feb. 23, 1934

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

[fol. 166] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed Feb. 28, 1934

Come now the above-named appellants, Thomas C. Rowley, Treasurer of Converse County, State of Wyoming; Charles M. Hall, Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, Treasurer of Niobrara County, State of Wyoming, and move the court for a stay of mandate, or other process therein, for a period of thirty (30) days in order to afford time to said appellants to prepare and present their application for a writ of certiorari in said cause to the Supreme Court of the United States.

And appellants hereby certify that the foregoing motion for stay in mandate is presented in good faith.

Ray E. Lee, Attorney General of the State of Wyoming; John J. McIntyre, County and Prosecuting Attorney, Douglas, Converse County, Wyoming; H. S. Harnsberger, County and Prosecuting Attorney, Lander, Fremont County, Wyoming; George A. Weedell, County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Harold I. Bacheller, Deputy County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Thomas O. Miller, County and Prosecuting Attorney, Lusk, Niobrara County, Wyoming, Attorneys for Appellants. James A. Greenwood, Cheyenne, Wyoming, Special Counsel for Appellants.

[File endorsement omitted.]

[fols. 167 & 168] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Feb. 28, 1934

This cause came on to be heard on the motion of appellants for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 169] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,495. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 9. Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming, et al., etc., Petitioners, vs. Chicago and Northwestern Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed March 24, 1934. File No. 9, O. T., 1934.

FILE COPY

CHARLES ELMORE CRO
CLER

Supreme Court of the United States

October Term, 1933

No. [redacted] 9

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, and Brief in Support Thereof

RAY E. LEE,
Attorney General of the State of Wyoming.
JOHN J. McINTYRE,
County and Prosecuting Attorney,
Converse County, Douglas, Wyoming.
H. S. HARNSBERGER,
County and Prosecuting Attorney,
Fremont County, Lander, Wyoming.
GEORGE A. WEEDELL,
County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.
HAROLD I. BACHELLER,
Deputy County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.
THOMAS O. MILLER,
County and Prosecuting Attorney,
Niobrara County, Lusk, Wyoming.
ATTORNEYS FOR PETITIONERS.

JAMES A. GREENWOOD,
Cheyenne, Wyoming.
SPECIAL COUNSEL FOR PETITIONERS.

LABOR JOURNAL, CHEYENNE

Subject Index

	Page
PETITION FOR WRIT OF CERTIORARI	1
A Issues in the Case	1
B Opinions and Decrees of the Lower Courts	3
C Statement of Facts	3
D Reasons Relied on for the Allowance of the Writ of Certiorari	5
E Brief Accompanying Petition	6
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	8
I The Opinions of the Courts Below	8
II Jurisdiction	9
III Statement of the Case	1, 3, 9
IV Specifications of Error	10
V Argument	10
1. The Federal Court was without equitable jurisdiction of the action, etc.	10
2. The Federal Court was without equitable jurisdiction to determine value, etc.	17
3. The tax was levied uniformly upon all property in Wyoming of the same class without discrimination, etc.	19
4. The Wyoming State Board of Equalization * * * exercised its honest judgment, etc.	20
5. The decrees of the lower courts are contrary to law as pronounced in the decisions of this Honorable Court	25
VI Conclusion	27

Authorities Cited

Page

Allen v. Pullman's Palace Car Co., 139 U. S. 658, 662 15

Board of Com'rs v. Searight Cattle Co., 3 Wyo. 777, 796; 31 Pac. 268, 275, 276 14
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276; 29 Sup. Ct. Rep. 426 15
Bradford Electric Light Co. v. Clapper, 284 U. S. 221 9
Bunten v. Rock Springs Grazing Ass'n, 29 Wyo. 461, 480; 215 Pac. 244 ..... 12, 27

Carton v. Board of County Com'rs, 10 Wyo. 416, 438; 69 Pac. 1013 ..... 14, 16, 17
Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, 98, 99 16
Cleveland C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 439, 445, 446 24
Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599 ..... 18, 27

Farncomb, et al. v. City & County of Denver, 252 U. S. 7, 11, 12 ..... 11, 14

Hale v. Allinson, 188 U. S. 56, 77, 78 11
Heine v. Levee Com'rs, 86 U. S. 655, 661 18
Henrietta Mills v. Rutherford County, 281 U. S. 121 14

Kelley v. Rhoads, 7 Wyo. 237; 51 Pac. 593 18
Kentucky Railroad Tax Cases, 115 U. S. 321, 334, 335, 339 ..... 16, 27
Keokuk & Hamilton Bridge Co. v. Salm, et al., 258 U. S. 122 14
Kirwan v. Murphy, 189 U. S. 35, 54, 55 18

Magnum Import Co., Inc. v. Coty, 262 U. S. 159 9
Mathews, et al. v. Rodgers, et al., 284 U. S. 521 15
Minot v. Philadelphia, etc. R. R. Co., 85 U. S. 206 27

Pittsburg, C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 432, 434, 436 ..... 14, 24
Public Service Commission, et al. v. Batesville Tel. Co., 284 U. S. 6 9

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481 15
Smith v. Wilson, 273 U. S. 388, 391 9
Southern Railway Co. v. Watts, 260 U. S. 519, 526, 527 ..... 16, 27
State Railroad Tax Cases, 92 U. S. 575, 614, 615 18
Stratton v. St. L. Southwestern Ry. Co., 284 U. S. 530 ..... 15, 16
Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 352, 353 ..... 16, 17

Taylor v. Secor, 92 U. S. 575, 614, 615 ..... 14, 16, 18, 27

Western Union Tel. Co. v. Attorney General of Mass., 125 U. S. 530 24

Yost v. Dallas Co., 236 U. S. 50, 56, 57 18

Constitutional Provisions Cited

Page

Article XV, Section 10, Wyoming Constitution 17

Article XV, Section 11, Wyoming Constitution 15, 18

Statutory Provisions Cited

Judicial Code (28 USCA §§ 347, 384) 9, 11

Section 89-4201, Wyo. Rev. Stat. 1931 14

Section 89-4202, Wyo. Rev. Stat. 1931 13

Section 89-4203, Wyo. Rev. Stat. 1931 13

Section 115-119, Wyo. Rev. Stat. 1931, Appendix 29

Section 115-311, Wyo. Rev. Stat. 1931 ..... 13, 14, 17

Section 115-501, Wyo. Rev. Stat. 1931, Appendix 29

Section 115-502, Wyo. Rev. Stat. 1931, Appendix 29

Section 115-511, Wyo. Rev. Stat. 1931, Appendix 29

Section 115-512, Wyo. Rev. Stat. 1931 ..... 11, 13

Section 115-515, Wyo. Rev. Stat. 1931, Appendix 33

Section 115-516, Wyo. Rev. Stat. 1931, Appendix 33

Section 115-519, Wyo. Rev. Stat. 1931 ..... 18, 20
Appendix 33

Section 115-1801, Wyo. Rev. Stat. 1931, Appendix 35

Section 115-1802, Wyo. Rev. Stat. 1931, Appendix 35

Section 115-1803, Wyo. Rev. Stat. 1931, Appendix 36

Section 115-1804, Wyo. Rev. Stat. 1931, Appendix 39

Section 115-1809, Wyo. Rev. Stat. 1931, Appendix 39

Section 115-1810, Wyo. Rev. Stat. 1931, Appendix 40

Supreme Court of the United States

October Term, 1933

No......

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation,

Respondent.

Petition for Writ of Certiorari

To the Honorable The Supreme Court of the United States:

The petition of Thomas C. Rowley, Treasurer of Converse County, State of Wyoming; Charles M. Hall, Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, Treasurer of Niobrara County, State of Wyoming, respectfully shows to this Honorable Court:

A

ISSUES IN THE CASE

1. On the 7th day of November, A. D. 1931, the respondent, Chicago and Northwestern Railway Company, an Illinois corporation, filed in the United States District Court for the District of Wyoming, its Bill in Equity against your petitioners, residents of the State of Wyoming, seeking to enjoin your petitioners from collecting the full amount of

tax levied against its operative railroad property in the State of Wyoming for the year 1931. (Bill, §§ 1, 2, 3, 4, 5; R. 1, 2)

(a) The alleged grounds for equitable relief are that respondent's operative railroad property in Wyoming has been subject to fraudulent discrimination, being intentionally, greatly over-valued while all other property in Wyoming has been intentionally, grossly under-valued for taxation (Bill, § 14; R. 5) in violation of respondent's constitutional rights under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Wyoming. (Bill, §§ 7, 8; R. 2, 3)

(b) It is alleged that the tax levied upon said over-valuation is, because of such intentional discrimination, illegal. (Bill, §§ 7, 8; R. 2, 3)

(c) It is alleged intentional discrimination resulted from certain classes of taxable property being intentionally, entirely omitted from the assessment rolls. (Bill, § 14; R. 5)

(d) It is alleged intentional over-valuation of respondent's property, intentional under-valuation of all other property, and the intentional omission entirely from the assessment rolls of certain classes of taxable property, have been pursued over a period of years with the intent and purpose of compelling respondent to pay taxes greatly in excess of the amount legally due from it. (Bill, § 14; R. 6)

(e) The prayer was for permanent injunction, and such other relief as to the Court may seem just and equitable. (R. 8)

2. Petitioners answered, denying the existence of any of the grounds complained of, averred the legality of the tax and that respondent had an adequate, full and complete remedy at law. (Answer, § 16; R. 23)

3. Respondent failed to prove, (1) the existence of intentional over-valuation of its property; (2) intentional under-valuation of any taxable property; (3) intentional, entire omission of any class or classes of taxable property from the assessment rolls; or (4) the existence of fraud in the taxation of respondent's property. Both lower courts so found. (District Judge's Memorandum, R. 42, 43; Finding of Fact No. 9, R. 46; Circuit Court's Opinion, R. 151-156)

4. The permanent injunction was not granted upon any ground alleged in the Bill in Equity, but because the Trial Court concluded that the Wyoming State Board of Equalization had made an error in its labors to reduce the value of respondent's Wyoming property to grant some relief to respondent. (R. 43)

B

OPINIONS AND DECREES OF THE LOWER COURTS

A temporary restraining order was granted ex parte, which remained in effect until the final hearing. (R. 11)

On the trial on the merits, findings of fact, (R. 45-47) conclusions of law (R. 47, 48) and decree of the United States District Court for the District of Wyoming (R. 48, 49) were in favor of the respondent. A permanent injunction was granted as prayed for, and respondent was awarded its costs.

In due time, petitioners appealed the case to the United States Circuit Court of Appeals for the Tenth Circuit, which Court, in its decree dated January 9th, A. D. 1934, (R. 163) affirmed the decree of the United States District Court for the District of Wyoming. The opinion of the Circuit Court of Appeals by Circuit Judges Sam G. Bratton and Orie L. Phillips and District Judge J. Foster Symes, Judge Bratton writing, Judge Symes dissenting on the question of jurisdiction, is reported in ..... Fed. (2nd) Page ....., Advance Sheet No. ....., ..., 1934. (R. 151-162)

In due time, petitioners filed in the Circuit Court of Appeals for the Tenth Circuit, their petition and supporting brief for a rehearing, which was, on February 23rd, 1934, denied. (R. 165)

C

STATEMENT OF FACTS

Your petitioners respectfully show that the facts involved and on which the Circuit Court of Appeals for the Tenth Circuit rendered its decree affirming the decree of the United States District Court for the District of Wyoming, are as follows:

Respondent operates a railroad running through nine states, including Wyoming, and the portion of its main line track in Wyoming runs into and/or through four counties.

Conditions throughout the system are not substantially uniform.

The Wyoming State Board of Equalization valued respondent's operative railroad property in Wyoming for taxation for the year 1931 at $7,989,587.00 (R. 106) and so notified respondent. A hearing upon respondent's objections to this valuation was held, which resulted in the valuation being reduced in the amount of $108,583.00.

This reduced valuation was obtained by taking the mean of four factors, viz., traffic units, 1.58; use of rolling stock, 1.65; composite of gross and net operating revenue, 1.89 corrected to 1.79; and percentage of main line track in Wyoming to the entire main line track mileage of the system, 3.29, being 2.1, (R. 114) and allocating this percentage, $7,881,004.00, of the system value, $375,285,902.00, (which was not in dispute) to Wyoming for taxation. Each of the factors so used represents the Wyoming portion as related to the entire system.

On August 30th, 1932, the Trial Court reached the conclusion, and rendered a memorandum judgment, which appears at Page 28 of the Record, holding that the Federal Court was without jurisdiction to entertain this action because the respondent had not established that it did not have an adequate remedy at law. Upon re-arguing the question of jurisdiction, the Trial Court reversed its position (R. 33) and held that the Federal Court did have jurisdiction, and enjoined the collection of the tax based upon the reduced value of $7,881,004.00 for Wyoming, so determined, upon the sole basis of the use of the factor 3.29, holding that the inclusion of this factor with the other three factors in determining the reduced value was erroneous because of the non-uniformity of the conditions of respondent's property within and without the State of Wyoming, stating that the State Board of Equalization, with knowledge of such non-uniformity of conditions, had made no allowance therefor, and for this reason, the use of this factor amounted to a transcending of respondent's constitutional rights. (Judge's Memorandum, R. 33, 42, 43) The decree of the Circuit Court of Appeals for the Tenth Circuit affirmed the decree of the United States District Court upon the same ground. (See Opinion of Circuit Court of Appeals, R. 151-156)

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Your petitioners are advised, and so believe, that under the facts and the law of this case, the decree of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the decree of the United States District Court for the District of Wyoming enjoining petitioners from collecting the taxes as levied upon the operative railroad property of respondent in Wyoming upon the valuation determined by the Wyoming State Board of Equalization, is erroneous and in violation of the rules, decisions and principles of law as pronounced by this Honorable Court, and that this Honorable Court should require said case to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such case made and provided, for the following reasons:

1. Because the Federal Court was without equitable jurisdiction of the action, the Statutes of the State of Wyoming affording full, complete and adequate legal remedies.

2. Because the Federal Court was without equitable jurisdiction to determine the value of respondent's taxable, operative, railroad property in Wyoming and direct an apportionment of such value to tax collecting officers, and the action of the Trial Court in so doing constituted an unlawful interference with the lawful exercise of legislative authority of the State of Wyoming.

3. Because the tax was levied uniformly upon all property in Wyoming of the same Class (all railroad properties) without discrimination, (R. 106) and was not levied in violation of any of the provisions of the Constitution of the United States, or of the Constitution of the State of Wyoming (Bill, § 12; R. 4); and aside from claimed over-valuation, the legality of the tax is not questioned. (Bill, § 8; R. 3, 4)

4. Because the Wyoming State Board of Equalization, in fixing the value of respondent's taxable, operative, railroad property for taxation, exercised its honest judgment, free from fraud or intentional discrimination and made allowance for the difference in the character and value of respondent's taxable property in Wyoming as compared to the value of

the property of respondent's railroad system in the other states.

5. Because the decree of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the decree of the United States District Court for the District of Wyoming, is contrary to law as pronounced in the decisions of this Honorable Court.

E

BRIEF ACCOMPANYING PETITION

Your petitioners append hereto their brief in support of this petition, in which each and all of the foregoing matters are more fully set forth and discussed.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 881, Thomas C. Rowley, Treasurer of Converse County, State of Wyoming; Charles M. Hall, Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, Treasurer of Niobrara County, State of Wyoming, Appellants, vs.Chicago and Northwestern Railway Company, a Corporation, Appellee, that the decree of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the decree of the United States District Court for the District of Wyoming, may be reviewed by this Honorable Court; and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet and just.

RAY E. LEE,
Attorney General of the State of Wyoming.

JOHN J. MCINTYRE,
County and Prosecuting Attorney,
Converse County, Douglas, Wyoming.

H. S. HARNSBERGER,
County and Prosecuting Attorney,
Fremont County, Lander, Wyoming.

GEORGE A. WEEDELL,
County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

HAROLD I. BACHELLER,
Deputy County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

THOMAS O. MILLER,
County and Prosecuting Attorney,
Niobrara County, Lusk, Wyoming.

ATTORNEYS FOR PETITIONERS.

JAMES A. GREENWOOD,
Cheyenne, Wyoming.

SPECIAL COUNSEL FOR PETITIONERS.

Supreme Court of the United States

October Term, 1933

No......

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming, CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation,

Respondent.

Brief in Support of Petition for Writ of Certiorari

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the District of Wyoming is reported in 1st Fed. Supp., Page 729, Chicago and Northwestern Railway Co. vs. Thomas C. Rowley, Treasurer, et al., and is at Pages 33-49 of the Record.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 68 Fed. (2nd) Page 517, Advance Sheet No. ....., March 17, 1934, Thomas C. Rowley, Treasurer, et al. vs. Chicago and Northwestern Railway Co., and is at Pages 151-162 of the Record.

II

JURISDICTION

1. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938 (28 USCA § 347)).

2. The decree of the Circuit Court of Appeals was entered January 9th, 1934. Petition for rehearing was denied February 23rd, 1934. (R. 165)

3. The parties are citizens of different states and the matter in controversy exceeds in value the jurisdictional amount as to each petitioner. (R. 47) The action is in equity, in which respondent seeks to permanently enjoin the county treasurers of Converse, Fremont, Natrona and Niobrara Counties, in the State of Wyoming, from collecting taxes levied on its operative railroad property within said counties in the State of Wyoming.

4. The grounds on which respondent relies for injunctive relief against the collection of the taxes are stated in Subdivision A of the petition.

5. The decree of the United States Circuit Court of Appeals for the Tenth Circuit affirms the decree of the United States District Court for the District of Wyoming, enjoining petitioners from collecting the taxes based upon the valuation determined by the Wyoming State Board of Equalization.

6. The following decisions of this court are believed to sustain jurisdiction of this appeal:

Bradford Electric Light Co. v. Clapper, 284 U. S. 221.
Public Service Commission, et al. v. Batesville Telephone Co., 284 U. S. 6.
Smith v. Wilson, 273 U. S. 388, 391.
Magnum Import Co., Inc. v. Coty, 262 U. S. 159.

III

STATEMENT OF THE CASE

Statements of the case and of the matters involved are set forth under Subdivisions A and C of the petition.

IV

SPECIFICATIONS OF ERROR

In its decree affirming the decree of the Federal District Court, the United States Circuit Court of Appeals for the Tenth Circuit committed prejudicial error, materially affecting the substantial rights of the petitioners:

1. In holding that the Federal Court had equitable jurisdiction of said action, the Statutes of the State of Wyoming affording complete and adequate legal remedies.

2. In affirming the action of the Federal Court in determining the value of respondent's taxable, operative, railroad property in Wyoming and directing the apportionment of that value to the tax collecting officers.

3. In that the Bill of complaint fails to state facts sufficient to constitute a cause of action for equitable relief in the Federal Court as against said petitioners, or either of them.

4. In holding that the State Board of Equalization of the State of Wyoming, in valuing respondent's railroad property for taxation, did not take into consideration and make allowance for the difference in the character and value of respondent's property in Wyoming as compared to the value of the property of respondent's railroad system in the other states.

5. In that the decree of the United States Circuit Court of Appeals for the Tenth Circuit is not supported by the evidence and is contrary to law as pronounced in the decisions of this Honorable Court.

V

ARGUMENT

1.

The Federal Court was without equitable jurisdiction of the action, the Statutes of the State of Wyoming affording full, complete and adequate legal remedies.

Every ground in the Bill urged by respondent in support of its claim for equitable relief, except the question of excessive value for the single year 1931, failed of proof. The alleged over-valuation is the basis upon which injunctive relief

was granted. The conclusion that four separate suits in the state courts will of necessity follow a denial of injunctive relief is without support in the Record and there are no allegations to that effect in the Bill. Courts of equity will consider whether complete justice to all parties, petitioners as well as respondent, will follow if jurisdiction is taken upon the ground of avoiding a multiplicity of suits.

The situation provoked by the Federal District Court taking equitable jurisdiction in the case at bar is that functions of government, state, county, city and school district, maintained by revenue derived from taxation, are interfered with.

The respondent does not challenge the tax in question until the very last hour; does not object to the valuation as reduced by the Wyoming State Board of Equalization in response to its objection, from $7,989,587.00 to $7,881,004.00; does not attempt to prevent certification by the Wyoming State Board of Equalization to the collecting officers; does not attempt to prevent the levy based upon the valuation certified; does not plead or evidence inability to pay the tax levied; does not allege or claim inability of petitioners, or any of them, to make full restoration.

Hale v. Allinson, 188 U. S. 56, Opinion at Pages 77, 78.

Before respondent could invoke the aid of a Federal court of equity, it was necessary for it to exhaust the legal remedies provided by the laws of the State of Wyoming.

Farncomb, et al. v. City and County of Denver, 252 U. S. 7, 11, 12.
Judicial Code, Sec. 267, (28 USCA § 384).

Respondent did not pursue its legal remedies to final conclusions. Section 115-512, Wyoming Revised Statutes, 1931, as follows:

> "Any person, persons, firm or corporation, who may feel aggrieved by the assessment or assessments by the board may take an appeal from the decision of the board to the district court of the county wherein the property or some part thereof is situated, where a trial de novo to the court shall be had.
>
> "The party or parties appealing shall, within sixty days after the decision of the board, file in the district court to which the appeal is taken a petition setting out the cause of complaint, and a copy of the records of the

board, all duly certified by the secretary of said board, and copies of said assessment or assessments.

"The party appealing shall at the time of filing such appeal enter into an undertaking to be approved by the clerk or judge of said district court, and to be given to the state of Wyoming in such an amount as the court or judge may fix, but in no case less than five hundred dollars ($500.00), and conditioned that the appellant shall prosecute the appeal without unnecessary delay, and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property, the assessment of which is in controversy.

"The clerk of the court shall immediately upon filing of the appeal notify the secretary of the board under the seal of the court, and supply him with a copy of the petition.

"It shall be the duty of the attorney general and the county attorney of the county to which the appeal is taken to represent the board in proceedings on the appeal.

"All proceedings on appeal except as herein otherwise provided shall be under the provisions of the code of civil procedure, as in other civil cases."

provides a full, complete, adequate and simple procedure by which the question of valuation could have been determined de novo by the District Court in the county wherein respondent's property, or some part thereof, is situated. In such a proceeding, respondent could have escaped the result of the alleged unlawful acts of the Wyoming State Board of Equalization and could have been presented for consideration anew in the District Court of any one of the four counties where any part of such property is situated, the question of valuation. This, it failed to do.

No levy could have been certified to the county assessors by the Wyoming State Board of Equalization until the value of the property was determined by the District Court. Respondent made no effort to pursue its legal remedies. It could have, in one proceeding against the Wyoming State Board of Equalization, tested the validity of the valuation complained of.

Bunten v. Rock Springs Grazing Ass'n, 29 Wyo. 461, 480; 215 Pac. 244.

Section 115-512, Wyoming Revised Statutes, 1931, supra, contains provision for a case of this character, providing full and complete jurisdiction to dispose of it in a single action, and the remedy thus furnished is plain, simple, adequate and complete.

Section 89-4202, Wyoming Revised Statutes, 1931, provides:

> "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action."

Section 89-4203, Wyoming Revised Statutes, 1931, provides:

> "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments."

Section 115-311, Wyoming Revised Statutes, 1931, provides:

> "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation, shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth."

Section 89-4201, Wyoming Revised Statutes, 1931, provides:

> "District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

The above statutes provide an adequate legal remedy.

Henrietta Mills v. Rutherford County, 281 U. S. 121.
Farncomb v. City and County of Denver, supra.
Keokuk & Hamilton Bridge Co. v. Salm, et al., 258 U. S. 122.
Pittsburg, C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 432, 434, 436.
Taylor v. Secor, 92 U. S. 575, 614, 615.

These citations state the general and well recognized principle of law, defining the limitations of the equitable jurisdiction of Federal courts when the matter in controversy is the proposed interference by a court of equity with the collection of state revenue. The showing must be such as to leave but one conclusion, viz., that there is no other adequate and complete method of relief for the complaining party.

A suit is not necessary to obtain a refund of illegally collected taxes. Section 115-311, Wyoming Revised Statutes, 1931, supra, has been construed by the Wyoming Supreme Court in the case of Carton v. Board of County Commissioners, Vol. 10 Wyoming Reports 416, Page 438, 69 Pacific 1013, as mandatory upon the county commissioners of a county to direct the county treasurer to refund the amount of such tax to the taxpayer where the tax paid is found to be erroneous or illegal; and the same court has not denied authority in the board of county commissioners to allow a refund upon the presentation by a taxpayer of an application for a refund of an illegal tax without the bringing of a suit.

Board of Com'rs v. Searight Cattle Co., 3 Wyo. 777, 796; 31 Pac. 268, 275, 276.

There is neither allegation or proof of the existence of any special circumstances which would render the legal remedy inadequate.

Stratton v. St. Louis Southwestern Ry. Co., 284 U. S. 530.

The case at bar comes clearly within the rule stated in the case of Mathews, et al. v. Rodgers, et al., 284 U. S. 521. As in the Mathews case, respondent seeks, in a Federal court, to interfere by injunction with operations of the administrative functions of state government, and as there stated, the mere illegality or unconstitutionality of a state or municipal tax is not in itself ground for equitable relief in the courts of the United States.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481.
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276; 29 Sup. Ct. Rep. 426.

Something more than what the record in the case at bar discloses must be present to justify the granting of equitable relief in a Federal court.

Mathews, et al. v. Rodgers, et al., supra.

There is no fraud proved; no property is taxed that is not legally liable to taxation. There is no proof of the violation of the rule of uniformity prescribed by Article XV, Section 11, of the Constitution of the State of Wyoming. (See Page 18) There is no proof of irreparable damage to respondent that will inevitably result from a consummation of the acts allegedly threatened by the defendants.

Allen v. Pullman's Palace Car Co., 139 U. S. 658, 662.

In Paragraph 12 of the Bill (R. 4), respondent alleges that the value of its property was unlawfully and fraudulently fixed in excess of its actual value. In the Judge's Memorandum, (R. 33, 43) the Trial Court says, "reasonable and honest effort was made to fairly and honestly tax property and to secure the return of all property for taxation which is legally taxable."

The Court's conclusion that respondent's property in the State of Wyoming was over-valued must, to be consistent

with the above statement, reflect an honest mistake by the State Board of Equalization and will not give a Federal court jurisdiction in equity. An intentional, discriminative over-valuation, transcending respondent's constitutional rights, must be established to make it the basis of equitable relief in the Federal Court. The Record fails to contain any evidence to that effect, and the Trial Court, in its Memorandum, (R. 33, 42) says, "nor is there any showing which justifies the conclusion that there was a studied attempt on the part of the taxing officials to bring about a favorable result to one class of taxpayers over another."

There was no finding of fact in the record supporting the contention of respondent that fraud was committed by the State Board of Equalization in valuing respondent's property in Wyoming for taxation purposes. In the face of the record, the most that can be contended for by respondent is that the State Board of Equalization made an honest mistake or committed an error of judgment in valuing respondent's property. The Trial Court so concluded, (R. 43) and the Circuit Court of Appeals so affirmed. (R. 151)

The Federal District Court did not have jurisdiction to review the valuation fixed by the Wyoming State Board of Equalization.

Taylor v. Secor, supra.
Kentucky Railroad Tax Cases, 115 U. S. 321, 334, 335.
Southern Railway Co. v. Watts, 260 U. S. 519, 526, 527.
Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 352, 353.

Following the law as stated in the case of Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, 98, 99, the Record in the case at bar makes it clear, beyond conjecture, that the Federal Court was without jurisdiction.

Stratton v. St. Louis Southwestern Ry. Co., supra.

In the case at bar, all that need be determined is that the tax, or same portion thereof, is illegal and it then becomes the duty of the county commissioners to direct the county treasurer to make a refund.

Carton v. Com'rs, supra.

The refund of an illegal or erroneous tax is not dependent upon a judicial determination. Section 115-311, Wyoming Revised Statutes, 1931, supra, would be a useless enactment if one, having paid an illegal or erroneous tax, had to first litigate the question to obtain a refund.

The procedure pursued by respondent is what this statute is designed to eliminate, viz., the expense and inconvenience of litigation. The above statute provides for immediate refund of an illegal or erroneous tax upon payment of same and application for return thereof, and it has been, by the Supreme Court of the State of Wyoming, in Carton v. Com'rs, supra, held to be mandatory upon the board of county commissioners to direct the refund of any money paid in satisfaction of an illegal or erroneous tax. Neither the taxpayer nor the courts are free to assume that public officers will refuse to obey the mandate of this statute and compel the taxpayer to determine by litigation the question of error or illegality before a refund will be directed and paid.

Sunday Lake Iron Co. v. Township of Wakefield, supra.

2.

The Federal Court was without equitable jurisdiction to determine the value of respondent's taxable, operative, railroad property in Wyoming and direct an apportionment of such value to tax collecting officers, and the action of the Trial Court in so doing constituted an unlawful interference with the lawful exercise of legislative authority of the State of Wyoming.

Article XV, Section 10, of the Constitution of the State of Wyoming, provides:

"The duties of the state board shall be as follows: To fix a valuation each year for the assessment of live stock and to notify the several county boards of equalization of the rate fixed at least ten (10) days before the day fixed for beginning assessments; to assess at their actual value the franchises, roadway, roadbed, rails and rolling stock and all other property, used in the operation of all railroads and other common carriers, except machine shops, rolling mills and hotels in this state; such assessed valuation shall be apportioned to the counties in which said roads and common carriers are located, as a

basis for taxation of such property; provided, that the assessment so made shall not apply to incorporated towns and cities. Said board shall also have power to equalize the valuation on all property in the several counties for the state revenue and such other duties as may be prescribed by law."

Article XV, Section 11, of the Constitution of the State of Wyoming, provides:

"All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

Section 115-519, Wyoming Revised Statutes, 1931, Appendix, Page 33.

Kelley v. Rhoads, 7 Wyo. 237; 51 Pac. 593.

Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599.

Under these constitutional and statutory provisions, the duty of valuing railroad property for taxation and directing the levy of a tax thereon is placed with the State Board of Equalization. No judicial agency can exercise that function. The action of the Federal Court in determining the valuation and directing the apportionment of the amount of the tax to be certified to the tax collecting authorities is an attempt of the Federal Judiciary to exercise legislative powers of state government.

In the case at bar, the Federal District Court has exceeded its jurisdiction and invaded the legislative functions of the state government in assuming to determine the value of respondent's property for taxation and directing the apportionment thereof to the collecting officers.

Kirwan v. Murphy, 189 U. S. 35, 54, 55.
Heine v. Levee Com'rs, 86 U. S. 655, 661.
Taylor v. Secor, supra.
Yost v. Dallas County, 236 U. S. 50, 56, 57.
State Railroad Tax Cases, 92 U. S. 575, 614, 615.

3.

The tax was levied uniformly upon all property in Wyoming of the same class (all railroad properties) without discrimination and was not levied in violation of any of the provisions of the Constitution of the United States, or of the Constitution of the State of Wyoming; and aside from claimed over-valuation, the legality of the tax is not questioned.

In the case at bar, the Trial Court found that no intentional discrimination existed or had been practiced, stating that there was no intentional and systematic under-valuation of property generally throughout the State of Wyoming; that there was no intentional omission from the tax rolls of a considerable amount of property (R. 42, 43; also, Court's Ninth Finding of Fact, R. 46); and in the Judge's Memorandum, (R. 33, 42) the Court says, after concluding that respondent's property in Wyoming was over-valued:

> "The remaining point in the case revolves around plaintiff's contention, that plaintiff's property has been consistently, continuously and intentionally valued upon a different and a higher basis than other property in the state, together with the claim that much taxable property in the state has been continuously and intentionally omitted from taxation lists. Evidence has been presented on behalf of the plaintiff tending to support its contention in this respect. When the proofs are *analized,* however, it must be admitted that so far as the agricultural and grazing land valuations are concerned, they generally represent the true and full value of such properties. In other classes of property, there are isolated instances in some of the counties through which plaintiff's line passes, where there may have been valuations for assessment at less than the true value. These proofs, however, in my opinion, do not reach the dignity of a continuous, studied and intentional under-valuation, nor is there any showing which justifies the conclusion that there was a studied attempt on the part of the taxing officials to bring about a favorable result to one class of taxpayers over another. * * * The evidence presented does not therefore justify the granting of relief to the plaintiff upon this ground, in the face of a fair showing that reasonable and honest effort was made to fairly

and honestly tax property and to secure the return of all property for taxation which is legally taxable.

"Recapitulating, the conclusions of the court are, that the plaintiff is entitled to relief upon the basis of the erroneous inclusion of the track mileage percentage as a factor in determining the valuation of plaintiff's property in Wyoming; * * *."

4.

The Wyoming State Board of Equalization, in fixing the value of respondent's taxable, operative, railroad property for taxation, exercised its honest judgment, free from fraud or intentional discrimination and made allowance for the difference in the character and value of respondent's taxable property in Wyoming, as compared to the value of the property of respondent's railroad system in the other states.

In order to determine whether or not the respondent's property was valued by the Wyoming State Board of Equalization by an arbitrary and unreasonable method, it is necessary to examine the evidence.

The Board took into consideration the value placed upon respondent's property in Wyoming by the officers of the respondent in making its 1930 tax return (which is the basis used for determining the 1931 tax).

Section 115-519, Wyoming Revised Statutes, 1931, Appendix, Page 33.

That value, as sworn to by the officers of the respondent in its tax return, was $8,281,950.00. (R. 101)

The Board proceeded to determine the accuracy of this valuation as furnished by the respondent, testing this valuation by taking the figures representing the value of the property of the plaintiff's reproduction cost new, less depreciation established by the Interstate Commerce Commission, as the value of the same in 1917, adding the betterments since that date and applying a ratio of depreciation of 2½% per year.

In submitting its 1930 tax return, the respondent attached thereto an additional statement, which, it says, is a part thereof, and therein advised that it claimed the valuation

stated in the return does not represent the fair cash value of the property of the respondent.

Defendant's Exhibit No. 1, R. 102.

The Board next proceeded to determine the value of the respondent's property in Wyoming by using the factor 2.23, which represented the percentage of the entire net operating income of respondent's operative system in Wyoming. This percentage yielded a value of Wyoming property upon an earning basis, of $8,368,463.00.

The Board next proceeded to equalize the sum of these two figures, as determined by the procedure shown on Page 106 of the Record, and adding these two figures, dividing by two, the Board determined that the result, namely, $7,989,587.00, represented an equalized value with other property of like character, meaning other railroads, and thus found this value for respondent's Wyoming property for taxation. (R. 110)

For the purpose of determining whether it could justly make a further reduction of respondent's property value for 1931 taxation purposes comparable to other property of like character or kind, the Board took the five years of the net operating revenue, added them together, divided by five, and obtained the figure 2.114, which represented the actual earning capacity of the railroad over a five-year period. It next took the value of the physical property in Wyoming, as furnished by the respondent, and the net operating income for the year 1930, and adding these two figures, dividing by two, obtained the figure 2.14, as representing Wyoming's share of the value of the entire system based upon the respondent's figures furnished in its tax return.

The Board next considered the contentions of the respondent as to how the value of its property for taxation in Wyoming should be allocated, respondent contending that the following factors, and no others, would represent a just method of determining such value, namely, (1) the use of traffic units; (2) the use of rolling stock; (3) the operating revenue (gross). These factors yielding over a five-year average the figure 1.56, the Board could not reconcile this figure with what it thought was approximately the value at which respondent's property should be assessed.

Desiring, however, to give full consideration to the factors presented by respondent, the Board then took the first two factors presented by respondent, namely, traffic units and the

use of rolling stock, and added to those, two additional factors, namely, the mean average between net and gross operating revenue, giving the figure 1.79, and track mileage percentage, being the figure 3.29, and then determined the mean average of the four and arrived at the figure 2.1% of the value of the whole property of the system of respondent which is located in Wyoming and subject to taxation therein, this figure 2.1% giving a value to the property in Wyoming for taxation purposes for the year 1931 of $7,881,004.00.

The Board then proceeded to test the accuracy of this valuation by using respondent's figures given in its 1930 tax return as the value of its property in Wyoming as compared to the whole, and arrived at the figure 2.2%. Adding thereto the percentage of net operating income, 2.23%, the percentage of gross revenue, 1.46%, the average of use of rolling stock and the average of traffic units, 1.46, to which is added the factor 3.32, which is a ratio in keeping with the charges made by the respondent in the account submitted in their sworn statement of 1930, (R. 117) and dividing these five factors by the figure five, the Board obtained the result, 2.14.

In arriving at the value of respondent's operative property in Wyoming for taxation for the year 1931, the Board stated its objection to using the factors presented by respondent. (R. 108, 109) It further determined the percentage of all traffic turned over to the system by Wyoming and other roads to the system, being 37.38% of the whole traffic, finding the ratio for Wyoming to be 11.33%, making a difference of over 26%.

Exploring further to find the correct value of respondent's operative property in Wyoming for taxation for the year in question, the Board took the figure representing traffic units and the use of rolling stock, as presented by respondent, and adding thereto 26% of what it arrived at as the difference between traffic turned over to the system by Wyoming and by other roads to the system, and arrived at what the Board figured is a rectified condition of the application of traffic units and the use of rolling stock as the same might be applied to determining value in Wyoming for taxation purposes.

Next, the Board added to the result thus obtained, the net operating revenue in Wyoming and divided this sum by two, obtaining the figure 2.15, and felt convinced that the ratio upon which the value of respondent's operative property in

Wyoming for taxation purposes in 1931 was based, namely, the figure 2.1, was entirely fair to respondent; and this was a valuation less, in fact, than the value of other property of the same class and less than the valuation of the property as returned by respondent.

The Board stated why it would not accept the gross revenue as the respondent desired to use it in allocating value to Wyoming. (R. 109) The Board took everything into consideration, based upon the information furnished in the respondent's return of 1930 and such other information as was available, and considered the value of the main line track in Wyoming as compared to the value of the main line track of the system, and the value that the Board put on a mile of main line of respondent's road in Wyoming was $28,313.00, while the figure presented by the respondent as the average mile value for the entire system was $44,360.00. (R. 109)

The Board further considered the percentage of non-revenue freight hauled over the system as compared to the percentage of such freight hauled over the Wyoming portion of the system, and found that 8% more non-revenue freight was transported by Wyoming miles than on the miles of the system outside Wyoming. The Board also considered respondent's franchise in connection with the value of its property and treated it as part of the Wyoming property. (R. 110)

The Board considered that the figure $7,989,587.00 was the equalized value of respondent's property with other property in the state of like character,—that is, other railroads. (R. 110) If track mile percentage, 3.29, was used as the sole factor in determining the value of respondent's property in Wyoming for taxation for the year 1931, the result would be a value of $12,316,906.18 instead of the figure used, namely, $7,881,004.00, or 36% less than the value of such property as determined by the use of mileage unit basis. (R. 119)

The witness, McWhinnie, whose statement is not contradicted, says, "We considered the system value of all respondent's operative properties, including all its franchises." (R. 120)

The use of track mile percentage as a factor in determining value of railroad operative property of a railroad which is maintained and operated through different states, is a recognized, lawful method of determining value of such property in a single state for taxation purposes. Such factor may be

legally used as the sole measure of value in instances where there are no special circumstances existing to distinguish between the conditions in different states such as, for instance, terminal facilities of enormous value in one state and none in other states through which the road operates.

Cleveland C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 439, 445, 446.

Pittsburg C. C. & St. L. Ry. Co. v. Backus, supra.

The latter case above cited is authority for the legal use of track mile percentage for the purpose of allocating value for taxation in a single state when special circumstances are present relating to distinguishing elements of value in one state as against the value in another, this opinion being to the effect that it is not illegal to use the track mile percentage factor if value is not absolutely determined upon a mileage basis.

The State Board of Equalization took into consideration the exceptional values of respondent's property located in other states through which the system operates and made due allowance therefor in determining the value of Wyoming property. (R. 109)

Western Union Telegraph Co. v. Attorney General of Mass., 125 U. S. 530.

This case is authority for the use of mile percentage as a legal basis for apportionment of property value for taxation in a state where distinguishing circumstances are present and gives to the taxing state, value upon this basis, even though only 2,833.05 miles out of a total mileage of 146,052.60 miles of the system property are located in the taxing state, holding that because of the volume of business done by the company in the State of Massachusetts, considering the density of the population, and so forth, it was not an error to so value the property in Massachusetts.

5.

The decree of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the decree of the United States District Court for the District of Wyoming, is contrary to law as pronounced in the decisions of this Honorable Court.

Under assignment of error No. 4, we set forth in some detail what evidence the Record discloses to show that the State Board of Equalization did recognize and give full consideration to the admitted difference in character, quality, quantity, cost and value of the respondent's operative, railroad property located within the State of Wyoming in comparison with like property of the system located outside the State of Wyoming.

The decree of the Federal District Court, and the decree of the Circuit Court of Appeals affirming it, both rest solely upon the finding that the State Board of Equalization did not, in using the factor 3.29, take into consideration the difference in the character, quality, quantity, cost and value of respondent's property within and without the State of Wyoming. (Finding No. 7, R. 46; Conclusion No. 3, R. 47; Opinion of the Circuit Court of Appeals, R. 151, 155)

In contending that the decree is contrary to law, petitioners do not ask a review of evidence seeking a favorable construction of conflicting testimony, but frankly assert that the Record does not contain a single statement supporting the above finding and conclusion.

In Finding of Fact No. 5 (R. 45), the Trial Court says, "the quantity, quality, cost and value of plaintiff's property located within the State of Wyoming, measured upon the basis of miles of main line track, is greatly less than throughout its system."

The witness, McWhinnie, testified for petitioners that the value placed upon a mile of main line track in Wyoming was $28,313.00, while the average system mile value was $44,360.00, or a difference of $16,047.00 per mile, less value placed upon the Wyoming mileage.

On a percentage basis, Wyoming mileage was valued at 63% of the average system mile. (R. 109) If the value of Wyoming mileage had been determined solely upon mileage percentage basis, the Wyoming value would have been $12,316,906.18 (R. 119), while the value given Wyoming mileage

was $7,881,004.00, or 63% of the value obtained by the exclusive use of the factor 3.29.

The Trial Court says, (Memorandum, R. 33, 43) "it is rather apparent that the mileage percentage basis under the circumstances in the case at bar would not be adapted to any method of determining value unless it were possible to equalize this factor before being used", but refuses to give any consideration to the testimony of the witness, McWhinnie, wherein he explains the purpose of using this factor to offset the discrimination against Wyoming value to the extent of 26% if the factors, traffic units 1.58, and use of rolling stock 1.64, are used in the manner proposed by respondent; (R. 108) and his statement as to the discrimination resulting against equitable Wyoming value by the use of these factors when and if used in the manner that respondent proposed and insisted they should be used, is not contradicted. The witness, Balch, for the respondent, acknowledged the existence of this difference as found by Witness McWhinnie. (R. 128)

The Circuit Court of Appeals emphasizes the difference in the character and value of the property of the respondent throughout the system, (Opinion, R. 151, 154, 155) and says (Opinion, R. 151, 155) that the use of the factor 3.29, without recognizing and making allowance for this existing difference, constituted an unreasonable and arbitrary method of fixing the value of the property in Wyoming.

The witness, Lorch, testified for respondent as to what these existing differences in the character and value of respondent's property within and without the State of Wyoming consisted of. The Record, at Pages 87 to 96, contains the items of valuable property located outside the State of Wyoming which, respondent contends, make the difference in value. These items total $78,027,500.00. Subtracting this amount from the accepted system value of $375,285,903.00, and allocating value on a mileage basis after making this deduction, the average system mile value is $36,333.51.

Wyoming mileage was valued at $28,313.00 per mile, leaving Wyoming mileage valne $8,020.51 below the average system mile value after eliminating the value of all special improvements outside Wyoming listed by respondent.

The decree is based upon erroneous findings of fact and erroneous conclusions of law. Respondent admits the regularity of the tax in every respect, except the claim of overvaluation, and paid that portion of the tax which it acknowledged was due from it to the several petitioners.

On the question of valuation of respondent's Wyoming property, an honest difference of opinion between the officials of the respondent and the State Board of Equalization is the only controversial question in the Record. The decree, permanently enjoining the collection of any tax in excess of the amount found by the Trial Court to be due, based upon a valuation determined by that court, is contrary to law.

Kentucky Railroad Tax Cases, supra, Page 339.
Taylor v. Secor, supra.
Bunten v. Rock Springs Grazing Ass'n, supra.
Minot v. Philadelphia, etc. R. R. Co., 85 U. S. 206.
Southern Ry. Co. v. Watts, supra.
Coulter v. Louisville, etc. R. R. Co., supra.

VI

CONCLUSION

Your petitioners respectfully submit that the above case justifies, and calls for, the exercise by this Honorable Court of its powers of supervision, as the action of the Federal District Court in permanently enjoining the collection of the taxes in question based upon the valuation determined by the Wyoming State Board of Equalization, affects the whole revenue structure of the State of Wyoming, not only in the instant case, but in all future acts of the Wyoming State Board of Equalization in the honest performance of its constitutional and statutory duties, making its acts subject at all times to review and control by the Federal courts.

If this decision be permitted to stand, it will result in continuing and increasing litigation between aggrieved taxpayers and the State of Wyoming, based upon only an honest difference of opinion, materially interfering with, and disrupting, an orderly and systematic procedure in the raising of revenue for the maintenance of state, county, city and school governments of the state, permitting escape from taxation by disputing in a Federal court the legality of taxes based upon

nothing more than an assertion of error by the Wyoming State Board of Equalization in determining valuation of property for taxation.

Respectfully submitted,

RAY E. LEE,
Attorney General of the State of Wyoming.

JOHN J. MCINTYRE,
County and Prosecuting Attorney,
Converse County, Douglas, Wyoming.

H. S. HARNSBERGER,
County and Prosecuting Attorney,
Fremont County, Lander, Wyoming.

GEORGE A. WEEDELL,
County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

HAROLD I. BACHELLER,
Deputy County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

THOMAS O. MILLER,
County and Prosecuting Attorney,
Niobrara County, Lusk, Wyoming.

ATTORNEYS FOR PETITIONERS.

JAMES A. GREENWOOD,
Cheyenne, Wyoming.

SPECIAL COUNSEL FOR PETITIONERS.

Appendix

WYOMING REVISED STATUTES, 1931

Section 115-119:

Property to be listed yearly—Real estate. All taxable property is to be listed and valued each year, and real property is to be assessed at its true value in money at private sale, having regard to its quality, locality, natural advantages, the general improvements in the vicinity, and all other elements of its value.

Section 115-501:

Creation of board. There is hereby created a state board of equalization for the state of Wyoming.

Section 115-502:

Membership of board—Appointment. Said board shall be composed of three members, who shall be appointed by the governor by and with the advice and consent of the senate.

Section 115-511:

Duties of board. It shall be the duty of said board to make all necessary rules and regulations for the performance of its duties and for conducting hearings and other proceedings:

(a) To examine and compare the returns of the assessment of the property in the several counties, cities and towns and equalize the same, so that all taxable property in the state shall be assessed at its true and full value, and to that end may add to or deduct from the aggregate valuation of the property, or of any class or classes of property, in any county or counties, or in any district or subdivision thereof, such per cent. as will bring the same to its true value, and place its assessed valuation upon a par with property of the same class throughout the state. When such assessed valuation has been raised or lowered, the board shall give notice of the action taken, to the board of equalization of the county in which such property is situated, on or before the first Monday in August and upon receipt of such notice by such county board of equalization, the said county board of equalization shall

take the necessary action to make effective the action taken by the state board of equalization.

When in their opinion, it would be of assistance in equalizing values, the board may require any county assessor to furnish statements showing assessments of the property of any individuals, firms or corporations within the county. The board shall consider and equalize such assessments and may increase or decrease assessment of individuals, firms or corporations above the amounts returned by the county board of equalization when the property so assessed shall appear to be over-valued or under-valued, first giving notice to such persons of their intention so to do, which notice shall fix a time and place of hearing; provided, that any person, persons, firm or corporation may have the right of appeal from the decision of the board to the district court of the county wherein the property is situated;

(b) To carefully examine into all cases wherein it is alleged that property subject to taxation has not been assessed or has been fraudulently or for any reason improperly or unequally assessed, or the law in any manner evaded or violated, and to cause to be instituted such proceedings as will remedy improper or negligent administration of the taxing laws of the state;

(c) To confer with, advise and give necessary instructions and directions to county assessors throughout the state as to their duties under the laws of the state. One or more of the members of the board shall officially visit each county of the state annually and inquire into the method of assessment and taxation and ascertain whether the assessors faithfully discharge their duties, particularly as to their compliance with the laws requiring the assessment of all property not exempt from taxation;

(d) To advise with and aid and assist the county board of equalization in the performance of their duties;

(e) To require individuals, co-partnerships, associations and corporations to furnish such information as may be required by said board concerning all subjects pertaining to property owned by him, her, them, or it, for purposes of taxation;

(f) To direct proceedings, actions and prosecutions to be instituted to enforce the laws relating to the liability and punishment of public officers and agents of corporations, and individuals for failure or neglect to comply with the provisions of the laws of this state governing the return, assessment and taxation of property, and to cause complaints to be made against county assessors, members of county boards of equalization, or any other assessing or taxing officers, to the proper authority, for their removal from office for misconduct or neglect of duty;

(g) To subpoena witnesses to appear and give testimony, and to produce books, records, papers and documents relating to any tax matters which the board may have authority to investigate or determine, and to cause the deposition of witnesses residing within or without the state, or temporarily absent therefrom, to be taken, upon notice to the interested party, if any, in like manner that depositions of witnesses are taken in civil actions in the district court, in any matter which the board may have authority to investigate or determine;

(h) To furnish the governor from time to time all information he may require relative to tax matters, and to transmit to the governor on or before the third Monday of December of each year and to each member of the legislature on or before the second Tuesday in January of each odd numbered year, the report of the board for the year showing all taxable property in the state and the value of same in tabulated form;

(i) To require the attorney general or county attorneys in their respective counties to assist in the commencement and prosecution of actions and proceedings for penalties, forfeitures, removals and punishments for violations of the laws of the state in respect to the assessment and taxation of property, or to represent the commission in any litigation in which it may become involved in the discharge of its duties;

(j) To require city, town, county, state or other public officers to report information as to the assessment of property, collection of taxes, receipts from excises and other sources, the expenditure of public funds for any purposes, and such other information as may be needful or desirable in the work of the board of equalization, in such form and upon such blanks as the board of equalization may prescribe;

(k) To certify to the county boards of equalization the amount of levy for state purposes on or before the first Monday in August of each year. Whenever the valuation of any county, district or sub-division is changed by the state board of equalization, the officers of such county who have authority to levy taxes are required to use the valuation as fixed by the state board of equalization as a basis for making their levies for all purposes;

(l) To prescribe forms for uniform schedules, rolls and other documents and to determine how lands should be classified for assessment purposes;

(m) To require the county clerks of the several counties to furnish said state board of equalization with a list of the bona fide sales of real estate within their counties, showing the consideration, said list to be furnished monthly on blanks furnished by the state board of equalization and free of expense to said state board;

(n) To decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the advice and opinion of the attorney general; such opinion and the rules, regulations, orders and instructions of the state board of equalization prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and regulations and obey such orders and instructions unless and until the same are reversed, annulled or modified by a court of competent jurisdiction;

(o) For the purpose of enforcing its rules, regulations, orders and instructions, and compelling the observance and use of the forms prescribed by it, the state board of equalization may institute or cause to be instituted any proceedings, either civil or criminal, provided by law as a punishment for the neglect, failure or refusal to obey any lawful requirement or order by the board, or as a means of preventing the violation or disobedience of such orders, or compelling their enforcement;

(p) To require the county clerk of each county in the state, immediately after the county boards of equalization have been notified by the state board of equalization of the amount of the county values and state levy, to certify to the state board of equalization, on or before the tenth day of August of each year, in such form and detail as that board may pre-

scribe, the county levy, the school district values and the special school district levies fixed in their respective counties;

(q) To specify the amount of land or lands for mines or mining claims to which the gross output tax provisions of the constitution shall apply.

Section 115-515:

Tax levy made on valuation fixed by board. The county commissioners of the respective counties, in which any portion of any railroad, telegraph or telephone line may be situated, shall levy the requisite taxes for the year, upon the valuation of the property of said railroad, telegraph or telephone company, returned to them as aforesaid at the time provided by law for levying the other taxes.

Section 115-516:

Manner of collecting taxes. The taxes assessed and levied upon the property of any railroad, telegraph or telephone company, under the provisions of this chapter, shall be collected at the time and in the manner provided by law for the collection of other taxes.

Section 115-519:

Assessment of car companies. It shall be the duty of the state board of equalization to ascertain from the statements now required from the car companies and based upon the reports made by the railway companies operating in the state, the total mileage of the cars of each such mercantile or other company, or corporation, firm or individual, within the period of one year within this state. Said board shall ascertain the number of cars of each said company, or corporation, firm or individual by determining the number of cars which if kept in the state would be reasonably required in making such mileage, and such number of cars so found shall be the number of cars on which said company, firm, or individual shall be assessed for said year. The said board shall ascertain and fix the valuation upon each particular class of cars, which as nearly as possible, shall be the true value of such cars, and the number so ascertained shall be assessed to the respective car company, mercantile or other company, firm or individual. For the purpose of making the assessment, the board is authorized to base the assessment upon the returns of the sev-

eral railroad companies. In case any such company, mercantile or other company, firm, or individual, shall fail or refuse to make the statement herein required, the board shall fix the value of such cars and in determining the number and value of such cars the board in so far as may be practicable, shall harmonize the statements of the several car companies, mercantile or other companies, firms or individuals with respect thereto and such assessment shall be included in the records and proceedings of the board. For the purpose of determining the amount of county levy that is to be assessed in the various counties of the state it shall be the duty of the county clerks of the respective counties to certify to the state board of equalization each year, as soon as their county levy is fixed the amount of same. It shall also be the duty of the said board of equalization, and it is hereby authorized and empowered, for the purpose of taxation, each year when it has determined the number of miles traveled by, and the valuation of any car or cars of any car company, mercantile or other company, firms or individuals over the lines of any of the several railroad companies operating in this state, and the proper mileage apportionment of such valuation, to make a levy against the values assessed for each of the respective counties through which said car or cars may have been operated. When said levy shall have been determined the state board of equalization shall cause to be sent to each owner of car line property a statement of the amount of the valuation or assessment, the rate of levy and the amount of tax to be assessed for each of the respective counties in or through which said car or cars have traveled during the year, and the total amount of the same, which tax so found and notified shall be paid into the state treasury for the credit of the respective counties to which it shall be due. When all of such taxes have been collected it shall be the duty of the state treasurer to pay to the respective county treasurers the amount due their respective counties less the state tax, together with the statement of said amounts which shall be paid by the county treasurer to the various school districts as now required by law. In the event that the taxes levied, as provided in this section, shall not have been paid on or before the thirty-first day of December of the year in which it was levied, they shall become delinquent and shall bear interest thereafter at the rate of eight per cent. per annum, and if such taxes and interest due thereon shall not have been paid on the first day of Feb-

ruary following the levy thereof, the state treasurer shall collect the same by distress and sale of any property belonging to such delinquent owner in the same manner as is required of county treasurers in like cases, and the order or certificate of the state board of equalization in such cases shall be sufficient authority therefor.

Section 115-1801:

Assessment of property of railroad companies. The state board of equalization is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the state of Wyoming; provided, however, that all machine shops, rolling mills and hotels, tie preserving plants and any property which is not used in connection with the operation of such railroads and railroad corporations, shall be assessed by the county assessor of the county in which such property is situated, in the manner now provided by law for the listing and valuation of real and personal property.

Section 115-1802:

Time of assessment—Property included. The board, on or before the first Monday of May of each year, shall proceed to ascertain all property of any railroad or railroad corporation, owning, operating or controlling any railroad or railroad service in this state; which for the purpose of assessment and taxation, shall be held to include the main track, second track, side tracks, spur tracks, warehouse tracks, road bed, right-of-way and depot grounds, and all water and fuel stations, buildings and super-structures thereon, and all machinery, rolling stock, telegraph lines, telephone lines and instruments connected therewith, and all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the franchise and all other property of such railroad company used or held for the purpose of operating its road, except machine shops, rolling mills, hotels, tie preserving plants and any property which is not used in connection with the operation of such railroad and railroad corporation; and appraise and assess the same as personal property as herein provided.

Section 115-1803:

Return of schedule of property—Contents. On or before the first day of May in each year, the person, company, or corporation, owning, operating or controlling any railroad or railroad service in this state, shall, by its president, secretary, or principal accounting officer, return to the state board of equalization, a sworn statement or schedule of the property of such company on the first Monday of February preceding, as follows:

First. Of the right-of-way, track and road bed, giving the entire length of the main track in this and other states, and showing as to this state the portion in each county, and actual value;

Second. The length of side or second track and turn-out, spur, and warehouse track, the aggregate length of such side or second track, turn-out, spur and warehouse tracks, together with the name of the county in which such side or second track and turn-outs, spur, and warehouse tracks are located, and the actual value;

Third. A complete list giving size and location, as to each county, material and value of all depots, station houses, stock yards, scales, section houses or other buildings, situated wholly or in part on the right-of-way, or depot grounds, or used in the operation of the railroad, together with all platforms, fuel and water stations and machinery and tanks connected therewith, and the actual value;

Fourth. The number of ties in track per mile, the weight of iron or steel rails per yard, used in the main, second or side track, what joints or chairs are used in track, kind of ballasting, length of time iron or steel has been used, and what length of time the road has been built;

Fifth. A full list of the rolling stock belonging to or operated by such road, which shall distinctly set forth the numbers, class and actual value of all locomotives, passenger cars, dining cars, official cars, pay cars, express cars, mail cars, baggage cars, grain cars, box cars, horse cars, cattle cars, double-deck cars, coal cars, flat cars, oil tank cars, water tank cars, wrecking cars, hand cars, motor hand cars, velocipedes, push cars, and all other kinds of cars, owned or used by such company, whether within or without the state of Wyoming,

together with a statement of the number of miles of travel by each of the classes of cars over the line of such company within the state of Wyoming and without the state of Wyoming, separately, during the year preceding the first day of January last preceding the date of the report;

Sixth. A correct return and actual value of all snow plows, flangers, derricks, and all tools and materials used for repairing, and all other personal property in the state of Wyoming, together with such other information as the state board of equalization may require in order to enable them to apportion said rolling stock between the main line and the branches of the road;

Seventh. A true statement and actual value of all bridges, tunnels, snow sheds, snow fences, and right-of-way fences, showing where located as to county;

Eighth. A statement or schedule showing:

(1) The amount of capital stock authorized, and the number of shares into which such capital stock is divided;

(2) The amount of capital stock paid up;

(3) The market value of such stock, or if no market value, then the true value of the shares of stock;

(4) The total amount of all secured and unsecured indebtedness, except for current expenses of operating the road;

(5) The location and actual valuation of all its real estate and personal property in this state that is locally assessed.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the state board of equalization, which value shall be taken into account and be considered in arriving at the true value of such railroad property and its franchise;

Ninth. The total gross earnings and net earnings from railway operations of said corporation during the year for which said statement is made, and the amount expended in the operation and maintenance of the property and improvements thereof, distinguishing that expended in improvement or betterment from that expended in maintenance and operation; also the dividend last declared upon its shares and the amount thereof, and the date, number, and the amount of all dividends declared and paid upon its stock during the year next preceding the date of such report, and such other infor-

mation as the state board of equalization may in writing require, all of which shall be taken into consideration in ascertaining and fixing the value of such road and the franchise thereof, together with such other information as the state board of equalization may require in relation thereto;

Tenth. A statement or schedule showing:

(1) The name of the company;

(2) The nature of the company, whether a person, association, company or corporation, and under the laws of what state or country organized;

(3) The location of its principal office;

(4) The name of the place where its books, papers and accounts are kept;

(5) The name and post-office address of the president, secretary, treasurer, auditor, superintendent, general manager, counsel, directors and all other general officers;

(6) The name and post-office address of the chief officer or managing agent of the railroad company in Wyoming, and of all other general officers residing in the state;

(7) The market value of the shares of capital stock for the whole system on the dates and for the period the board may request or specify;

(8) If such stock has no market value, the actual value on the dates and for the periods the board may request or specify;

(9) The funded debt of the railroad company for the whole system and a detailed statement of all series of bonds, debentures or other securities forming a part of the funded debt, at par value, with date of issue, maturity, rate of interest and interest paid;

(10) The market value of each series of funded debt of the whole system, of the dates and for the periods designated by the board, and if the whole or a part of such funded debt has no market value, then the actual value thereof for such dates and periods as the board may specify;

(11) A statement in detail of all capital stock, bonds or other securities of such railroad company owned by, or held in trust, for the company, and the capital stock, bonds or other securities of other persons, companies or corporations owned by or held in trust for it, and the par value and the market value of the same;

(12) The whole length of the lines of the railroad system operated by the company and the length of the lines in Wyoming, and each city and village, whether operated as owner, lessee or otherwise; the length of the line owned and the length of the line operated for the whole system, and in Wyoming, shall be separately reported;

(13) The annual reports of the board of directors or other officers to the stockholders of the company for the five years preceding;

(14) In addition, all other information and facts herein required, and such other facts and information as the board may require in the form of returns prescribed by it.

Section 115-1804:

Investigation of return. The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the state board of equalization shall, from all the information which it is able to obtain, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line.

Section 115-1809:

Notification of company by board. As soon as the state board of equalization shall have made and determined said valuation and assessment aforesaid, and before certifying to the county assessors of the several counties the valuation and assessment so made by it on the property of any railroad or railroad corporations, in the manner as provided herein, it shall notify in writing by registered mail, the company or some officer thereof, what valuation and assessment it has made upon said property; and if the company shall have any objection to the valuation and assessment as made by the said state board of equalization, it shall have fifteen days thereafter in which to file with said board its objection in writing fully setting forth therein the nature of said objection, and such company shall after the making of said notice, have the right to appear and be heard by said board, on all matters relative to valuation and assessment of the property of said

company, and the said board of equalization shall within a reasonable time after the receipt of such written objection notify said company when it shall appear and be heard. On or before the first Monday in July, or as soon thereafter as the said board or any two thereof shall have made and determined such valuation and assessment, the said board of equalization shall certify to the county assessors of the several counties in which the property of any such company may be situated, the assessment so made on the property; the county commissioners shall thereupon divide the amount falling within each school district in their respective counties and cause such amounts to be entered and placed on the list of taxable property returned by the several assessors.

Section 115-1810:

Contents of return by assessors. Such return shall include the following:

(1) Number of miles of track of each railroad located in each county sub-division in the county, and the total length of such road in the county;

(2) The average valuation per mile of such road;

(3) The valuation that shall be placed to the credit of such county.

RECEIPT is hereby acknowledged of the service of a copy of the TRANSCRIPT OF THE RECORD in the Circuit Court of Appeals for the Tenth Circuit, and..... copies of the PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, this..... day of....., A. D. 1934.

.....

.....

.....

.....

Counsel for Respondent.

Subject Index

	Page
Respondent did not exhaust its available administrative remedies	1
The use of track mileage percentage as a valuation factor	6
There was no discrimination or lack of uniformity in valuing respondent's Wyoming property	9
Conclusion	10

Authorities Cited

Bucknum v. Johnson, 127 Pac. 904	4, 6
Bunten v. Rock Springs Grazing Ass'n., 29 Wyo. 461, 479; 215 Pac. 244	7, 9
Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94; 69 L. ed. 183, 188, 189	8
Cooley on Taxation, Vol. 3, Section 1144	9
Coulter v. Louisville & Nashville Ry. Co., 196 U. S. 599; 49 L. ed. 615	9
Cumberland Coal Co. v. Board of Revision, U. S. S. Ct. A. Op. #3, Dec. 7, 1931; 76 L. ed. 146	9
Erie Ry. Co. v. Commonwealth of Penn., 88 U. S. 492; 22 L. ed. 595, 598	8
Fargo v. Hart, 193 U. S. 490, 499	10
Kentucky R. R. Tax Cases, 115 U. S. 321, 335; 29 L. ed. 414	7
Midwest Hotel Co. v. State Board of Equalization, 273 Pac. 696	1, 2
Minot v. Philadelphia Wilm. & Balt. R. R. Co., 85 U. S. 206; 21 L. ed. 888, 896	8
People ex rel. Town of Cicero v. Sweitzer, 170 N. E. 728, 734	7
Pittsburg, etc. Ry. Co. v. Backus, 154 U. S. 421, 431, 435; 38 L. ed. 1031	9, 10
Porter, State Auditor, etc. v. Investors' Syndicate, 286 U. S. 461; on rehearing, 287 U. S. 346	6
Southern Ry. Co. v. Watts, 260 U. S. 519, 527, 528; 67 L. ed. 388	7
Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 352, 353; 62 L. ed. 1154	9
Taylor v. Secor, 92 U. S. 575; 23 L. ed. 663	7
Union Tank Line Co. v. Wright, 249 U. S. 275, 282	10
Wallace v. Hines, 253 U. S. 66, 69	10

2

Constitutional and Statutory Provisions Cited

	Page
Article V, Section 1, Wyoming Constitution	2
Article V, Section 10, Wyoming Constitution	2
Section 89-4801, Wyo. Rev. Stat. 1931	5
Section 89-4803, Wyo. Rev. Stat. 1931	5
Section 91- 306, Wyo. Rev. Stat. 1931	3, 4
Section 112- 512, Wyo. Rev. Stat. 1931	4
Section 115- 512, Wyo. Rev. Stat. 1931	1, 4
Ch. 73, Sec. 41, Session Laws of Wyo. 1931	2, 3

Supreme Court of the United States

October Term, 1934

No. 9

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,

Respondent.

Supplement to Brief in Support of Petition for Writ of Certiorari

RESPONDENT DID NOT EXHAUST ITS AVAILABLE ADMINISTRATIVE REMEDIES

Supplementing petitioners' brief filed in support of their petition for a writ of certiorari, Section 115-512, Wyoming Revised Statutes, 1931, which is set out and quoted in full at Pages 11 and 12 of the original brief, provides a way whereby respondent could have submitted to the District Court of either of the districts in Wyoming in which any portion of the taxable property was located, the question of valuation as fixed by the State Board of Equalization on July 14, 1931. (See § 11 of petitioners' answer, R. Page 15.) By appeal under this statute, respondent could have had the question of valuation determined anew and it was its duty to so exhaust all administrative channels of relief if aggrieved by the valuation fixed by the State Board of Equalization.

This statute was before the Wyoming Supreme Court in the case of Midwest Hotel Company vs. State Board of Equal-

ization, which is reported in 273 Pacific at Page 696, wherein the Supreme Court was asked to review the ruling of the trial court, declining to entertain an appeal by an aggrieved taxpayer from a decision of the State Board of Equalization. The trial court declined to take jurisdiction on the ground that it had no appellate jurisdiction of the subject matter.

Article V, Section 1, Constitution of the State of Wyoming:

> "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration and such courts as the legislature may, by general law, establish for incorporated cities or incorporated towns."

Article V, Section 10, Constitution of the State of Wyoming:

> "The district court shall have original jurisdiction of all causes at law and in equity and in all criminal cases, of all matters of probate and insolvency and of such special cases and proceedings as are not otherwise provided for. The district court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, injunction and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective disdricts."

The Supreme Court sustained the judgment of the trial court, but on a different ground entirely and because the statute was held to be so defective as not to be capable of being put into effect. After the decision by the Supreme Court in the Midwest Hotel Co. case, supra, the Legislature amended the statute by adding the following provisions:

> "The party or parties appealing shall, within sixty days after the decision of the board, file in the district court to which the appeal is taken a petition setting out

the cause of complaint, and a copy of the records of the board all duly certified by the secretary of said board, and copies of said assessment or assessments.

"The party appealing shall at the time of filing such appeal enter into an undertaking to be approved by the clerk or judge of said district court, and to be given to the state of Wyoming in such an amount as the court or judge may fix, but in no case less than five hundred dollars ($500.00), and conditioned that the appellant shall prosecute the appeal without unnecessary delay, and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property, the assessment of which is in controversy.

"The clerk of the court shall immediately upon filing of the appeal notify the secretary of the board under the seal of the court, and supply him with a copy of the petition.

"It shall be the duty of the attorney general and the county attorney of the county to which the appeal is taken to represent the board in proceedings on the appeal.

"All proceedings on appeal except as herein otherwise provided shall be under the provisions of the code of civil procedure, as in other civil cases." (See Ch. 73, Sec. 41, Session Laws of Wyoming, 1931.)

thereby supplying that which the Supreme Court held was necessary to make the statute operative.

A similar statute of Wyoming is found as Section 91-306, Wyoming Revised Statutes, 1931, which provides for appeals from the Board of Land Commissioners and is in the following language:

"Any party who may feel himself aggrieved by the decision of the board of land commissioners rendered in any contest proceeding held before said board, may have an appeal from such decision to the district court sitting within and for the county in which the land in controversy is situated. All persons joining in the appeal shall be joined as appellants, and all persons having interests adverse to the parties appealing, or any of them, shall be joined as appellees; and upon said appeal being perfected, said contest proceeding shall stand to be heard and for trial de novo, by said court."

Section 112-512, Wyoming Revised Statutes, 1931, is identical in purpose to Section 91-306, supra, and provides for an appeal from any assessment made by the State Board of Equalization to a district court, and this statute, Section 91-306, Wyoming Revised Statutes, 1931, was considered by the Wyoming Supreme Court in the case of Bucknum vs. Johnson, reported in 127 Pacific at Page 904, wherein the Supreme Court says:

> "The jurisdiction of the District Court on the appeal is to try the case de novo on the facts and its judgment is not one of affirmance, reversal or modification as upon review upon error, but is based upon its finding upon the evidence, and is not governed by the findings of the board; and the court is in a sense substituted for the board to determine the matter in issue upon the facts. The question to be determined by the court is the same as that which was presented to the board, * * *."

Under the statutes in question in the case at bar, the District Court has been charged by the Legislature, in addition to its judicial functions, with the duty of performing administrative functions with authority to determine the valuation of the respondent's property if and when the respondent desires to avail itself of the privilege of asking this administrative function to be performed in its behalf where it is not satisfied with the valuation determined by the State Board of Equalization, for whom, under the circumstances, the trial court is substituted. This hearing de novo is an integral part of the administrative procedure adopted by the Legislature as a method for levying and collecting taxes on railroad property.

Before respondent could resort to the jurisdiction of a federal court of equity to enjoin the collection of the taxes in question on any ground, it was its duty to exhaust every available administrative remedy afforded by the Statutes of Wyoming, including an appeal to the District Court as a tribunal directed to exercise administrative powers in valuing the respondent's taxable property in Wyoming. The respondent wholly failed and neglected to pursue this administrative remedy to its finality and, therefore, is now estopped from seeking relief in a federal court of equity.

Section 115-512, Wyoming Revised Statutes, 1931, embraces every element of adequate protection for one availing itself

of this remedy to have its property re-valued. The period of time within which an aggrieved party must act is within sixty days after the decision of the Board, which in the instant case was made on July 14th, 1931; and in order to prevent any further proceedings on behalf of administrative officers to collect the tax pending appeal, the statute authorized the posting of a bond and fixed the minimum amount thereof, which, when posted, would fully protect respondent until the disputed valuation was fixed and a levy on the property ultimately made.

The statute further provides that, except as therein otherwise provided, all proceedings on such an appeal shall be under the provisions of the Code of Civil Procedure as in other civil cases. Article 48, title, "Proceedings in Error," of the Wyoming Revised Statutes, 1931, Section 89-4803, defines the jurisdiction of the Supreme Court of the State of Wyoming:

> "A judgment rendered or final order made by the district court may be reversed in whole or in part, vacated or modified by the supreme court for errors appearing on the record. Where a judgment is reversed in part for error relating only to an issue which is in no way dependent for its proper trial on any other issue or issues found to have been properly tried, and a partial new trial may be had without prejudice or injustice to any of the parties concerned, the cause may be remanded for the trial of the issue alone upon which the error was committed."

and Section 89-4801 defines a final order from which an appeal to the Supreme Court may be prosecuted:

> "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment, is a final order which may be vacated, modified or reversed, as provided in this article."

This latter section specifically provides that an order affecting a substantial right made in a special proceeding shall be appealable. Respondent complains of the order of the State Board of Equalization fixing an assessment or valuation upon

its property, claiming that such order takes from it property in violation of its constitutional rights. The order of the District Court in fixing valuation would obviously be that of a special order, as such court is then sitting in an administrative capacity to perform a function enjoined upon it by the Legislature.

The Wyoming Supreme Court has given recognition to the fact that a remedy may be afforded by an appeal to the District Court from an order or action of an administrative body, and the legality of the bestowal of such administrative power on the district courts of Wyoming under the Constitution has been determined by the Supreme Court in the Bucknum vs. Johnson case, supra, as not offensive to the State Constitution separating the state government into judicial, executive and legislative branches. See Porter, State Auditor, etc., vs. Investors' Syndicate, 286 U. S. 461; and on rehearing, 287 U. S. 346.

THE USE OF TRACK MILEAGE PERCENTAGE AS A VALUATION FACTOR

Respondent, in subdivision 2 of its brief, complains that the use by the State Board of Equalization of track mileage percentage as an allocating factor constituted a wholly wrong principle and method, and that the propriety of using traffic units and use of rolling stock as two factors was conceded to be correct. These statements are incorrect. Not until the respondent filed its brief in the United States Circuit Court of Appeals did it advance the contention that a wholly wrong principle and method was used by the State Board of Equalization in determining value, and to the contrary, the bill of complaint contains no allegation to that effect.

The grounds of respondent's complaint against the allocation of Wyoming valuation, as stated in Paragraph 12 of the Bill of Complaint, (R. Pages 3, 4) is that the factor percentage of miles of road operated was used arbitrarily and unlawfully because the State Board of Equalization failed and neglected to take into account the fact that the value of plaintiff's property in the State of Wyoming, measured by the number of miles of main line track, is less than one-half the value of its property located in states other than the State of Wyoming when so measured.

Traffic units and use of rolling stock were not conceded to

be proper factors. It is stated in Part II, Page 14, of respondent's brief that these factors were accepted. To the contrary, the State Board of Equalization contended they could not be correctly used in the manner proposed by respondent or as they were actually used by the trial court to determine value.

The use of the factors traffic units and rolling stock as they were actually used by the trial court, was unjustified. The Wyoming State Board of Equalization (R. Pages 108-109, 119-120) stated its objection to the use of these factors unless the track mileage factor, 3.29, was also used to offset the discrimination against Wyoming resulting from their use.

The holding of the court below that respondent's operative property in Wyoming was substantially and arbitrarily overvalued for taxation purposes for the year 1931, and the placing by the court below of a lesser value thereon than the value fixed by the Wyoming State Board of Equalization, are contrary to the law and facts in this case.

It is only where a valuation has been fraudulently made that it is subject to judicial review. See People ex rel. Town of Cicero v. Sweitzer, 170 N. E. 728, Page 734. The court below has no revisory power to prevent a valuation fixed arbitrarily by the State Board of Equalization in the absence of proof of fraudulent intent being the impelling motive in fixing such valuations. See Kentucky Railroad Tax Cases, 115 U. S. 321, Page 335, 29 L. Ed. 414. Fraud must be alleged and proved to justify interposition of courts of equity. See Taylor v. Secor, 92 U. S. 575, 23 L. Ed. 663; Bunten v. Rock Springs Grazing Association, Vol. 29 Wyo. Rep. 461, Page 479, Vol. 215 Pac. Rep. 244.

The use of an erroneous method of valuation by the State Board of Equalization does not authorize the interposition of a court of equity. The state officials are not required to follow any prescribed formula in determining property valuations for taxation. See Bunten v. Rock Springs Grazing Association, supra. The duty of the Board is to exercise an informal and honest judgment in fixing values for purposes of taxation. See Southern Railway Co. v. Watts, 260 U. S. 519, 527-528, 67 L. Ed. 388. The court below stated that the State Board of Equalization so performed its duty. See Judge's Memorandum of Nov. 9, 1932, R. Pages 42-43.

The court below proceeded to re-value respondent's property for 1931 taxation in Wyoming, stating (R. Page 43) that the State Board of Equalization had erroneously used

the mileage percentage factor. No other reason is assigned for the action of the court in lowering the property valuation of respondent. The court had no authority to substitute its judgment for that of the state officials, duly authorized to perform such duties, based alone upon the finding that the state officials used an erroneous method of determining value. See Minot v. Philadelphia Wilm. & Balt. R. R. Co., 85 U. S. 206, 21 L. Ed. 888, Page 896; The Erie Ry. Co. v. Commonwealth of Penn., 88 U. S. 492, 22 L. Ed. 595, Page 598.

There is not in the Record in the case at bar, a finding of fact or any evidence to the effect that the State Board of Equalization intentionally discriminated against respondent or its property in valuing the same for taxation for the year 1931. It is not sufficient that the State Board of Equalization acted arbitrarily or merely made a mistake. It is not enough that the court below reached a different conclusion as to value of respondent's operative property in Wyoming from the value fixed by the state officials for taxation purposes in the year 1931. To authorize the court to interfere with the value determined by the State Board of Equalization, there must be clear and affirmative showing that the difference is the result of intentional discrimination adopted and pursued as a practice by the State Board of Equalization. See Chicago Great Western R. Co. v. Kendall, 266 U. S. 94, 69 L. Ed. 183, Pages 188, 189.

In the above case, the court of three judges who heard the evidence submitted in support of the allegations of intentional discrimination by the state taxing tribunal, found against such contention, and that the alleged intentional discrimination did not exist, and denied the motion for injunction; and in the case at bar, the court below did not find that intentional discrimination existed or had been practiced, stating that there was no intentional and systematic under-valuation of property generally throughout the State of Wyoming, that there was no intentional omission from the tax rolls of a considerable amount of property. See R. Pages 42-43; See also, Court's 9th finding of fact, R. Page 45.

The appellants duly excepted to this finding for the reason that the same should have been positive and conclusive in form rather than to the effect that the evidence submitted by respondent is not sufficient. The failure to show the existence of these alleged conditions at a full hearing upon the merits

of the question at issue, is final and conclusive as between these litigants, unless, in a proper proceeding, the case be re-opened and further evidence received. And in the Judge's Memorandum, (R. Page 41) the court says:

> "* * * so far as the agricultural and grazing land valuations are concerned, they generally represent the true and full value of such properties. In other classes of property, there are isolated instances in some of the counties through which plaintiff's line passes, where there may have been valuations for assessment at less than the true value. * * *."

There was not a studied attempt on the part of the taxing officials to bring about a favorable result to one class of taxpayers over another. There is a fair showing that reasonable and honest effort was made to fairly and honestly tax property and to secure the return of all property for taxation which is legally taxable. The respondent is entitled to relief upon the basis of the erroneous inclusion of the track mileage percentage as a factor in determining the valuation of respondent's property in Wyoming, not because a wholly wrong principle and method was used by the State Board of Equalization in valuing respondent's property.

On this record, we submit the court below was without jurisdiction to substitute its judgment of valuation for that of the State Board of Equalization. See Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, Pages 352, 353, 62 L. Ed. 1154; Pittsburg, etc., Ry. Co. v. Backus, 154 U. S. 421, 435, 38 L. Ed. 1031; Cumberland Coal Co. v. Board of Revision, U. S. S. Ct. A. Op. #3, Dec. 7, 1931, 76 L. Ed. 146; Vol. 3, Cooley on Taxation, Section 1144; Coulter v. Louisville & Nashville Ry. Co., 196 U. S. 599, 49 L. Ed. 615; Bunten v. Rock Springs Grazing Ass'n., supra.

THERE WAS NO DISCRIMINATION OR LACK OF UNIFORMITY IN VALUING RESPONDENT'S WYOMING PROPERTY

Respondent complains of being the victim of intentional discrimination in the valuing of its property for taxation, which is to say there is a lack of uniformity in the valuing of property for taxation, and the Bill of Complaint (R. Pages 3 to 5, incl., §§ 12 to 14, incl.) states the alleged grounds for a claim of discrimination.

At Page 3 of respondent's brief in opposition to the application for a writ of certiorari, it now concedes all grounds of claimed discrimination, except over-valuation of its own property, to have failed of proof, and at Pages 79 and 80 of the Record, the chief witness for respondent, Mr. Balch, states he has no knowledge whatever of the actual value or the assessed value of other railroads in Wyoming, while Witness McWhinnie states (R. Pages 108-109, 114-115) that the valuation of respondent's property, taxed by the State Board of Equalization, was compared and equalized with like property of other railroads.

The respondent produced no evidence that its property was valued or assessed on a different or higher valuation than all other property of the same class within the State of Wyoming, and the Record establishes without contradiction that respondent's property was not valued on a different or higher basis than other property of the same class.

CONCLUSION

The sole ground stated by the trial court, and affirmed by the Circuit Court of Appeals, for granting the respondent equitable relief is that the State Board of Equilzation of Wyoming erroneously used, as a factor in determining the valuation of respondent's property for taxation, the factor 3.29, representing the percentage of miles of respondent's main line track located within the State of Wyoming as compared to the entire main line track mileage. Both lower courts refer to the following authorities as sustaining such conclusion:

Pittsburg, C. C. & St. Louis Ry. Co. v. Backus, 154 U. S. 421, 431.

Fargo v. Hart, 193 U. S. 490, 499.

Union Tank Line Co. v. Wright, 249 U. S. 275, 282.

Wallace v. Hines, 253 U. S. 66, 69.

We submit that these authorities do not condemn, as unlawful, the method pursued by the Wyoming State Board of Equalization in determining the valuation of respondent's operative property for taxation in Wyoming for the year 1931. The case of Pittsburg, C. C. & St. Louis Ry. Co. v. Backus, supra, declares the validity of the Wyoming assessment; and as stated in each of the other three cases cited by the trial court, the tax condemned was based absolutely and alone upon

the relation of track mileage within the taxing state to that of the entire system, and the value determined accordingly.

The Wyoming State Board of Equalization did not employ such method of valuation. The Record does not permit such a conclusion, and the evidence fails to establish such an attempt to determine value. The court stated the taxing officials acted honestly; that no purpose was disclosed to favor one class of taxpayers over any other class; that no intentional discrimination was shown.

Hence, we respectfully submit that the Federal Court did not have equitable jurisdiction; that the ruling of the trial court is contrary to the law as pronounced by the United States Supreme Court and is contrary to the uncontradicted evidence; that the decree of the Circuit Court of Appeals, affirming the decision of the trial court, should be reversed; that respondent's bill of complaint should be ordered dismissed, and petitioners be awarded their costs herein.

Respectfully submitted,

RAY E. LEE,
Attorney General of the State of Wyoming.

JOHN J. MCINTYRE,
County and Prosecuting Attorney,
Converse County, Douglas, Wyoming.

H. S. HARNSBERGER,
County and Prosecuting Attorney,
Fremont County, Lander, Wyoming.

GEORGE E. WEEDELL,
County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

HAROLD I. BACHELLER,
Deputy County and Prosecuting Attorney.
Natrona County, Casper, Wyoming.

THOMAS O. MILLER,
County and Prosecuting Attorney,
Niobrara County, Lusk, Wyoming.

ATTORNEYS FOR PETITIONERS.

JAMES A. GREENWOOD,
Cheyenne, Wyoming.

SPECIAL COUNSEL FOR PETITIONERS.

No. [illegible]

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation,

Respondent.

Petitioners' Reply Brief

RAY E. LEE,
Attorney General of Wyoming,
JAMES A. GREENWOOD,
Cheyenne, Wyoming,
COUNSEL FOR PETITIONERS.

JOHN J. McEVOY,
County and Prosecuting Attorney,
Converse County, Douglas, Wyoming.
H. S. HARRISON,
County and Prosecuting Attorney,
Fremont County, Lander, Wyoming.
GEORGE A. [illegible],
County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.
HAROLD [illegible],
Deputy County Attorney,
Natrona County, Casper, Wyoming.
THOMAS [illegible],
County Attorney,
Niobrara County, Lusk, Wyoming.
OF COUNSEL.

SUBJECT INDEX

Page

Proposition No. 1 2

Proposition No. 2 2

Proposition No. 3 6

Proposition No. 4 8

Statutory Provisions Cited

Section 58-104, Wyo. Rev. Stat. 1931 7

Section 89-4201, Wyo. Rev. Stat. 1931 4

Section 89-4202, Wyo. Rev. Stat. 1931 4

Section 89-4203, Wyo. Rev. Stat. 1931 ..... 2, 4, 6

Section 89-4204, Wyo. Rev. Stat. 1931 4

Section 115-311, Wyo. Rev. Stat. 1931 5

Section 115-512, Wyo. Rev. Stat. 1931 ..... 2, 8

Authorities Cited

Board of Comm'rs v. Searight Cattle Co., 3 Wyo. 777; 31 Pac. 268 ..... 4, 7

Bunten v. Rock Springs Grazing Ass'n, 29 Wyo. 461; 215 Pac. 244 4

Carton v. Board of County Comm'rs, 10 Wyo. 416; 69 Pac. 1013 5

Kelley v. Rhoads, 7 Wyo. 237; 51 Pac. 594 5

Moore v. The Board of Co. Comm'rs of Sweetwater Co., 2 Wyo. 8 7

Powder River Cattle Co. v. Board of County Comm'rs, 3 Wyo. 597; 29 Pac. 361 ..... 2, 3

Ver Straten v. Board of Co. Comm'rs, 35 Wyo. 67; 246 Pac. 916.. 6

Wyoming Railway Co. v. Leiter, 25 Wyo. 286; 169 Pac. 1 7

In the
Supreme Court of the United States

October Term, 1934

No. 9

THOMAS C. ROWLEY, Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, a Corporation,

Respondent.

Petitioners' Reply Brief

At Pages 97 and 98 of respondent's brief, are stated, as grounds for the affirmance of the decree of the Circuit Court of Appeals in the case at bar, the following specific reasons:

1. "The evidence clearly shows, and the trial court so found, its finding being affirmed by the Circuit Court of Appeals, that the complainant's property was systematically, arbitrarily and by the use of a wholly wrong principle and method, overvalued each year over a period of approximately five years, to the extent of more than $1,500,000.00."

2. That "the state statute with reference to suits to recover back illegal taxes paid is not an adequate legal remedy, because it involves at least four law actions, one against each county, and probably as many more as there are municipalities and school districts within the counties."

3. That the statute providing for the recovery of illegal taxes that have been paid is inadequate for the further reason that "no provision is made for the recovery of interest and because, probably, the amount that at the time of filing the law actions would have been distributed by the county treasurers to the state, could not be recovered at all."

4. That "the remedy provided by appeal under the state statute (which refers to Section 115-512, Wyo. Rev. Stat. 1931) is uncertain, inadequate and restricted to a state court."

PROPOSITION NO. 1.

As to systematic, arbitrary over-valuation of respondent's property by the use of a wholly wrong principle and method, the Court will observe by referring to the findings of fact, (R. pp. 44-46) that there is not such a finding.

There is no evidence in the Record that the trial court considered the valuation of the respondent's taxable, operative property in Wyoming for any year except 1931. Whatever evidence the respondent introduced relating to values for taxation purposes of its Wyoming property in years prior to 1931, was not sufficient to induce the court to make a finding that the allegations of the respondent's petition relating to over-valuation or intentional discrimination during the prior years in fact existed. All that the Record contains is that there was a difference of opinion between the witnesses of the respondent, being its officials, and the members of the Wyoming State Board of Equalization as to what the actual value of respondent's taxable, operative property in Wyoming was in 1931, a single year only.

PROPOSITION NO. 2.

As to Proposition No. 2, that the legal remedy was insufficient and inadequate because at least four law actions would have to be prosecuted, and probably as many more as there are municipalities and school districts within the counties, the Supreme Court of Wyoming has construed Section 89-4203, Wyo. Rev. Stat. 1931, (quoted at Page 13 of petitioners' brief) as to who are proper parties to an action to enjoin the collection of taxes or to recover taxes and assessments, and we quote from Powder River Cattle Co. v. Board of County

Comm'rs, 3 Wyo. 597, 29 Pac. 361, at Pages 607 and 608 of the Wyo. Report:

> "* * * It would appear that the object of the statute, section 3055, and the other sections of the same chapter, was to afford a simple and speedy remedy to the taxpayer, to allow him an injunction if the tax was alleged to be illegal before its collection, and a right to recover all taxes paid, after collection, from one source, and without a multiplicity of suits. * * *."

And again at Pages 610 and 611:

> "* * * The petition in the court below shows, and the law was and had been for more than four years before the enactment of section 3055, that the county treasurer should be ex officio collector of taxes. When the plaintiff in error paid its taxes which it seeks to recover, the payment was made to the collector and to the county treasurer, and, so far as county taxes proper were concerned, they were then paid over to the proper custodian of the county, and for its use and benefit. Then, if a county is a 'municipal corporation' within the meaning of the section and the proviso, no case could possibly arise where the collector of county taxes could be sued. If, on the other hand, keeping in view the language invariably used in our legislation, treating towns and cities as the only municipal corporations known to our laws, we hold that the legislature used these words in their proper sense, we have no difficulty in construing the proviso of the section reasonably and consistently with the other parts of the section. The tax collector, and he alone, is responsible; and the remedy must be pursued against him, if living, or his personal representatives if dead, for the space of one year,—the limitation of time for bringing such suits imposed by the statute,—unless the remedy is sought against a municipal corporation, a city, or town, in which case, if the tax money has been actually paid over by the municipal collector to the municipality for whose use and benefit it was levied and collected, the city or town must be sued, instead of the collector. The taxes levied for such municipalities are wholly levied and collected for their own use and benefit, and are disbursed by them; hence there is no necessity for pursuing the col-

lector, as there is but one corporation to look to for the money. The county, by law, is made the collecting agent for the state or territorial taxes, for county taxes proper, for the general school tax, and for special school district taxes, thus acting for three distinct corporate entities; while a municipality, such as a town or city, is the sole beneficiary of the tax levied by it."

In the case of Board of Comm'rs v. Searight Cattle Co., 3 Wyo. 777, 31 Pac. 268, quoting from Pages 797 and 798 of the Wyoming Report, the Supreme Court of Wyoming construes Sections 89-4201, 4202, 4203 and 4204, Wyo. Rev. Stat. 1931, in the following language:

"The remedy established in the Code (sections 3053 3056, inclusive) is a new one, and greatly simplifies the practice. It provides for enjoining a threatened illegal levy, enjoining the collection of an illegal tax, and for the recovery back of illegal taxes, and it seems that no other averment is necessary in the petition on this point than that the threatened levy is illegal, or that the tax is illegal; thus dispensing with the allegations required in equity in such cases to show irreparable injury, multiplicity of suits, accident, or mistake. If a taxpayer permits a threatened illegal levy to be made, without action on his part, or pays an illegal tax when he has a remedy by injunction to prevent its collection; he may even yet have his remedy against the collector; but if he waives these remedies, except the last, he ought not to complain that he is compelled to sue the collector to recover back the illegal tax, or urge the insolvency of that officer, or the harshness or injustice of the law which makes the collector personally responsible. The law was certainly framed as much for the benefit of the taxpayer as for that of the public. He has but one person to sue, and he is not forced to seek redress from the different corporations or bodies to whom the tax has been paid, and for whose use and benefit it was levied and collected, and thus be harassed by a number of suits. * * *."

In the case of Bunten v. Rock Springs Grazing Ass'n, 29 Wyo. 461, 215 Pac. 244, Section 89-4201, Wyo. Rev. Stat. 1931, has been construed at Page 473 of the opinion.

Section 115-311, Wyo. Rev. Stat. 1931, which is quoted at Page 13 of petitioners' brief supporting their petition for writ of certiorari, has been construed by the Supreme Court of the State of Wyoming in the case of Carton v. Board of County Comm'rs, 10 Wyo. 416, 69 Pac. 1013, cited in petitioners' brief in support of petition for writ of certiorari, and also in the case of Kelley v. Rhoads, 7 Wyo. 237, 51 Pac. 594, where, at Page 270 of the Wyoming Report, the Court says:

> "The fourth question reserved for our decision is, in substance, whether the payment of the tax by plaintiff, under the evidence, was voluntary or otherwise, and whether it was so made as would authorize its recovery if illegal. The facts as agreed to, are that the money was paid, after a refusal to pay the same upon a demand, and to prevent the seizure and sale of plaintiff's property, and the damages which would thereby accrue to the plaintiff. If that is true, we do not perceive what difference it makes, whether the threat made by the collector was that he *could* take enough sheep, or that he *would* do so. The concession that the payment was made to prevent the seizure, implies that seizure was intended or imminent, and that both parties so understood it. Under such a statute as that of 1895, requiring the same officer to assess, levy, and collect the taxes, giving him all the power of collecting officers, and applying to property of the character upon which these taxes were paid, it would not take very strong evidence of force to show a payment of the tax to be involuntary, particularly so when the statute, as in Section 3846, (which is an error in printing and should be Section 2846) enjoins upon the commissioners the duty of refunding such an amount as they should discover to be unjust. In our judgment the payment was made under such circumstances as would authorize the recovery if the tax should prove to have been illegal."

In view of the law as stated by the Wyoming Supreme Court in the above cases relating to the right to recover illegal taxes, there is no reason to fear a multiplicity of suits, but to the contrary, upon application being made therefor, a refund of illegal or erroneous taxes will be made without the necessity of any suit.

Section 89-4203, Wyo. Rev. Stat. 1931, specifically states that an action to recover taxes and assessments that have been illegally collected must be brought against the officer who made the collection, or if he is dead, against his personal representative, with the proviso that where the tax collected was not on the tax list, the corporation which made the levy must be joined in the action and that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit said tax was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments.

This statute cannot be construed to mean that when a tax has been levied and collected, but not on the tax list, which is the only authority for the county treasurer to collect taxes, he should be held responsible for the re-payment. The statute has not been construed to make the county treasurer liable for taxes that he did not collect.

The tax complained of in the case at bar was placed upon the tax list, (R. pp. 6 and 21) thus making the tax collector the only necessary defendant in an action to recover the amount paid, regardless of what disposition has been made of the money illegally or erroneously collected.

PROPOSITION NO. 3.

That the legal remedies provided by the statutes are inadequate because there is no provision made for the recovery of interest and further, because probably the amount at the time of filing the law actions would have been distributed by the county treasurer to the state and could not be recovered at all.

This proposition as to the loss by distribution to the state is clearly refuted by the authorities cited under Proposition No. 2; and as to there being no provision for interest in an action of this kind, the Supreme Court of Wyoming, in the case of Ver Straten v. Board of Comm'rs, 35 Wyo. 67, 246 Pac. 916, said, at Page 72 of the Wyoming Report, an action brought under the provisions of this statute "is in the nature of an action for money had and received, and lies when the county has received taxes which in equity and good conscience it ought to return."

The same construction as to the character of an action brought under this statute is found in an early case, Board of County Comm'rs v. Searight Cattle Co., supra, reported in 3 Wyo. 777, 31 Pac. 268; and preceding these authorities, in the first case to come before the Supreme Court of the Territory of Wyoming, Moore v. The Board of County Comm'rs of Sweetwater County, reported in 2 Wyo. 8, an illegal tax was ordered to be repaid, the order also embracing a direction to pay interest upon the amounts illegally collected from the date the collections were made.

Section 58-104, Wyo. Rev. Stat. 1931, which is as follows:

> "Rates on money due. On money due on any instrument in writing, in the absence of contract specifying the rate, or on settlement of an account from the day balance shall be agreed upon; on money received to the use of another, and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due, and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven per cent. per annum. Unsettled accounts shall bear interest after thirty days from the date of the last item thereof."

provides for the payment of interest on money retained without the owner's consent, express or implied, from the receipt thereof; and on money withheld by unreasonable delay in payment, interest shall be allowed at the rate of seven per cent. per annum.

The Supreme Court of Wyoming, in the case of Wyoming Railway Company v. Leiter, reported in 25 Wyo. 286, 169 Pac. 1, at Page 291 of the Wyoming Report, construed this statute (Sec. 58-104, Wyo. Rev. Stat. 1931) to the effect that interest should be allowed on an amount of money claimed to be due from the time the amount due was definitely determined.

Applying the reasoning in this case to the facts in the case at bar, there is no ground to assume that if the respondent paid to the county treasurer, involuntarily, a definite sum of money, the date of payment would not be the date when the unlawful retention commenced and the sum so paid would not be refunded with interest if it be established that the tax was illegal and that the county had received and retained the money which in equity and good conscience it was not entitled to retain.

PROPOSITION NO. 4.

Section 115-512, Wyo. Rev. Stat. 1931, quoted at Pages 11 and 12 of petitioners' brief, it is contended, is insufficient as providing a legal remedy because uncertain, inadequate and restricted to a state court.

This criticism is grounded upon a construction of this statute as being a judicial proceeding. Petitioners, as stated in their supplemental brief, contend that under this statute, legislative duties only have been enjoined upon a district court and that the justiciable status has not arrived when the taxpayer may select the forum of his choice, jurisdictional facts being available for that purpose, in which to litigate the question of the validity of the valuation placed upon his property as a basis of a tax levy.

Respectfully submitted,

RAY E. LEE,
Attorney General of Wyoming.

JAMES A. GREENWOOD,
Cheyenne, Wyoming.

COUNSEL FOR PETITIONERS.

JOHN J. MCINTYRE,
County and Prosecuting Attorney,
Converse County, Douglas, Wyoming.

H. S. HARNSBERGER,
County and Prosecuting Attorney,
Fremont County, Lander, Wyoming.

GEORGE A. WEEDELL,
County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

HAROLD I. BACHELLER,
Deputy County and Prosecuting Attorney,
Natrona County, Casper, Wyoming.

THOMAS O. MILLER,
County and Prosecuting Attorney,
Niobrara County, Lusk, Wyoming.

OF COUNSEL FOR PETITIONERS.

FILE COPY

APR 14
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. [redacted] 9

THOMAS C. ROWLEY, TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Ill.
ROBERT R. ROSE,
Of Casper, Wyoming,
Counsel for Respondent.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	Page
Official Reports of Opinions delivered by the Court below	1
Statement of the Case	2
Argument	6
I. The United States District Court had jurisdiction in Equity	6
(a) Prevention of Multiplicity of Suits.	6
(b) State Statutory Remedy only a restricted one	7
(c) State Statutory Remedy makes no provision for interest	8
(d) Preventing cloud on title	8
(e) Law remedy to defeat Federal Equity jurisdiction must be available in Federal Court	9
(f) State remedy by appeal does not defeat Federal Equity jurisdiction where justiciable stage reached	10
(g) Bill states sufficient facts	12
(h) Present case clear example of greater efficiency of Federal Equitable remedy	13
II. The State Board's use of track mileage as an allocating factor was such a wholly wrong principle and method as to bring about an arbitrary and intentional overvaluation of Respondent's Wyoming property, and, in effect, to tax its property outside Wyoming	14
III. The trial Court correctly restrained the collection of that part of the tax demonstrably growing out of the use of the wholly erroneous factor	18
Conclusion	19
Appendix	21

CASES CITED.

A. T. & S. F. Ry. v. Sullivan, 173 Fed. 456..... 17
Bacon v. Rutland R. R. Co., 232 U. S. 134..... 10
Carton v. Commissioners, 10 Wyo. 416..... 7
Chicago, Burlington & Quincy R. R. Co. v. Osborne, 265 U. S. 14 9
Chicago and North Western Ry. v. Bauman, 69 Fed. (2d) 171 (8th Circuit case decided Feb. 13, 1934, certiorari denied April 9, 1934, ... U. S. .....).. 11
Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288 8
Dennis v. M. & M. Ry. Co., 137 Ala. 649, 97 Am. St. Rep. 79 12
Detroit & Mackinac Ry. Co. v. Mich. R. R. Comm., 235 U. S. 402..... 10
De Witt v. Hayes, 2 Cal. 463, 56 Am. Dec. 352..... 12
Fargo v. Hart, 193 U. S. 490 .....15, 17
Franklin v. Nevada-California Power Co., 264 Fed. 643, 645 9
Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499 7
Hopkins v. Southern Cal. Tel. Co., 275 U. S. 393.... 8
Mathews v. Rodgers, 284 U. S. 521..... 11
Ogden City v. Armstrong, 168 U. S. 224, 237..... 9
Ohio Tax Cases (Ohio River and Western Ry. Co. v. Dittey) 232 U. S. 576 8
P. C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 421... 15
Prendergast v. New York Tel. Co., 262 U. S. 43..... 10
Prentis v. Atlantic Coast Line, 211 U. S. 210..... 11
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38-40.. 7

Risty v. C. R. I. & P. Ry. Co., 270 U. S. 378..... 9
Shaffer v. Carter, 252 U. S. 37..... 9
Smyth v. Ames, 169 U. S. 466, 516..... 9
Southern Ry. v. Kentucky, 274 U. S. 76..... 15
Stratton v. St. L. S. W. R. R. Co., 284 U. S. 530.... 11
Taylor v. L. & N. R. R. Co., 88 Fed. 350, 374, 172 U. S. 647 17
Town of Flagstaff v. Gomez, 242 Pac. (Ariz.) 1003.. 12
Union Pacific R. R. Co. v. Board of County Commrs. of Weld Co., 247 U. S. 282..... 7
Union Pacific v. Ryan, Marshal of the City of Cheyenne, and City of Cheyenne, 113 U. S. 516..... 8
Union Tank Line Co. v. Wright, 249 U. S. 275, 282.. 15
Wallace v. Hines, 253 U. S. 66 .....9, 15, 17
Wilson, Collector v. Illinois Southern Ry. Co., 263 U. S. 574 .....6, 11

CONSTITUTIONAL PROVISIONS CITED.

Wyoming Constitution Article II..... 10
Federal Constitution Article I, Section 8 (Commerce Clause) 3, 14
Federal Constitution, Fourteenth Amendment...3, 6, 14

STATUTORY PROVISIONS CITED.

Wyoming Revised Statutes, Section 89-4201 to 89-4203 .....6, 21
Wyoming Revised Statutes, Section 115-311.....7, 21
Wyoming Revised Statutes, Section 115-512.....10, 22

FEDERAL EQUITY RULE CITED.

Equity Rule No. 25..... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 892

THOMAS C. ROWLEY, TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURT BELOW.

C. & N. W. Ry. Co. v. *Rowley,* 1 Fed. Sup. 729.

Rowley v. *C. & N. W. Ry. Co.,* 68 Fed. (2d) 527.

STATEMENT OF THE CASE.

This is a suit in equity brought by the Chicago and North Western Railway Company against the County Treasurers of four Wyoming counties to restrain the collection of taxes claimed to be excessive and illegal. The Bill, filed in the District Court November 7, 1931, alleges (R. 1-8) that the State Board of Equalization, which is charged under the Wyoming Statute with the duty of assessing railroad property at its actual value each year prior to and including the year 1931 valued complainant's property for tax purposes at an amount more than $2,000,000.00 in excess of its actual value; that in the year 1931 the value fixed by the Board was $7,881,003.94, which was $2,031,433.94 in excess of the actual value that year; that the plaintiff owned and operated 8,180.2 miles of main line track in nine states, including 278.35 miles in Wyoming, and that the value of the Wyoming property per mile was less, and known by the State Board to be less, than one-half of the average system mile; that the State Board of Equalization determined the system value to be $375,285,902.00, and in allocating to Wyoming the value of the property in that state used as one of the factors 3.29%, representing the percentage in Wyoming of the system main line track, and that this factor was used arbitrarily and unlawfully without taking into account the difference in value between the Wyoming track mile and the system track mile; that the use of the main line track mile factor constituted a wholly wrong principle and method of fixing the value of the Wyoming property and resulted in an over-valuation of the complainant's Wyoming property amounting to more than $2,000,000.00.

It is also alleged in the Bill that the taxes levied by the

County Assessors of the four counties, upon values apportioned to the counties by the State Board upon the over-valuation mentioned, were illegal and excessive in proportion to the over-valuation and constituted a lien upon complainant's property and that unless the defendants were restrained from so doing they would sell complainant's property for the taxes.

The Bill of Complaint also alleged a systematic under-valuation of property other than that of the complainant and the omission from the tax rolls of a large amount of taxable property. The trial court found, however, that the allegations as to under-valuation and omission of taxable property were not sustained by sufficient evidence, to which no exception was taken by complainant, so that that element is eliminated from the case.

These allegations, in addition to the allegation as to diversity of citizenship, the amount involved as to each defendant and the allegation that the discrimination by the Board constituted an invasion of complainant's rights under the Fourteenth Amendment to the Federal Constitution and a violation of the commerce clause thereof constitute the substantive allegations of the Bill.

A temporary restraining order was issued upon the filing of the Bill (R. 8-10) and a temporary injunction was issued on December 28, 1931 (R. 11-12), previous to which time complainant had paid the taxes admitted by it to be due in accordance with the temporary restraining order.

Defendants' answer, filed January 7, 1932 (R. 12-27), admitted the diversity of citizenship; the jurisdictional amount; that the taxes levied would be collected by sale unless such action should be restrained; that the taxes levied constituted a lien upon complainant's property; the value fixed upon complainant's property by the State Board; the system and Wyoming track mileage as alleged

in the Bill; the system value as alleged; the consideration by the State Board of the percentage of Wyoming main line track in arriving at the value of the Wyoming property; and denies that complainant's property in Wyoming was over-valued and denies that the method by which the valuation was arrived at was arbitrary or unlawful.

The answer also denies the under-valuation or omission from the tax rolls of property other than that of the complainant and alleges that complainant's Wyoming property was actually worth several thousand dollars more than the value fixed upon it by the State Board.

The answer denies the allegation of the Bill that complainant has no adequate remedy at law and alleges that it has such remedy.

The substantial questions presented by the pleadings are:

1. Has the Federal Court jurisdiction in equity to grant the relief prayed for?

2. Did the use by the State Board of Equalization of the figure 3.29, representing the percentage of complainant's main line track in Wyoming, constitute a wholly wrong principle and method, resulting in an arbitrary and illegal over-valuation of complainant's Wyoming property?

After trial of the cause in March, 1932, and a written memorandum of the trial judge (R. 28-33) denying jurisdiction, a second memorandum was filed November 9, 1932 (R. 33-44) and findings of fact and conclusions of law filed December 17, 1932 (R. 45-49), in which the trial court found that the State Board used the percentage of miles of road in arriving at the value of complainant's Wyoming property without taking into account the difference between the cost and value of the average amount of road in the State of Wyoming as compared with the average system

mile, and that such use was erroneous, improper, unequal and arbitrary and constituted an arbitrary and unreasonable method and the application of a wholly wrong method and principle of determining the value of complainant's Wyoming property, resulting in an over-valuation to the extent of $1,602,468.90. And the court also found that complainant had no adequate remedy at law and that the trial court had jurisdiction in equity to grant the relief prayed for in complainant's Bill of Complaint, and a decree was entered accordingly (R. 48-49).

Upon appeal by defendants to the Circuit Court of Appeals, Tenth Circuit, the decision of the trial court was affirmed in an opinion by Circuit Judge Bratton, on January 9, 1934 (R. 151-156), with District Judge Symes dissenting (R. 156-162).

ARGUMENT.

I.

THE UNITED STATES DISTRICT COURT HAD JURISDICTION IN EQUITY.

There are admittedly present in this case diversity of citizenship and the requisite amount in controversy (R. 12-27). The bill is filed to restrain the collection of such an intentional and persistent over-assessment as would contravene the Commerce Clause of the Federal Constitution and the Fourteenth Amendment (R. 1-8).

(a) *Prevention of Multiplicity of Suits.*

As to the prevention of a multiplicity of suits and the inadequacy of alleged remedies at law, this case is ruled by *Wilson, Collector* v. *Illinois Southern Railway Company*, 263 U. S. 574. Like that case, this involves an over-assessment, made by a state board, and apportioned among all the counties in which the respondent's line of railroad extends. There is present here exactly the same necessity of pursuing in each of the four counties among which the assessment is apportioned, a separate suit at law, that there was in each of the five counties involved in the *Wilson case*. There is the same danger of a different result in each of the four counties. Such a remedy is not adequate. Manifestly, a multiplicity of suits is avoided by the present equity action.

The remedy provided by Wyoming Revised Statutes, sections 89-4201 to 89-4203 (quoted in Petitioners' brief, pages 13-14 and reproduced in the appendix hereto) authorizing the payment of taxes claimed to be illegal and the

maintaining of an action to recover such taxes, clearly contemplates a separate action in each county. As the court said in the decision sought to be reviewed herein, "obviously, four separate actions would be required, one against the Treasurer of each county" (R. 153).

Other cases sustaining the equity jurisdiction of the Federal courts under similar circumstances are:

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20 at 38-40.

Greene v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499.

Union Pacific R. R. Co. v. *Board of County Commissioners of Weld Co.*, 247 U. S. 282.

The remedy provided by Wyoming Revised Statutes, section 115-311 (quoted in Petitioners' brief, page 13 and reproduced in the appendix hereto), requiring the Board of County Commissioners to direct the County Treasurer to refund to the taxpayer taxes found to be erroneous or illegal, is not adequate, as it necessarily implies the bringing of an action in each of the four counties in case the Board of each county refuses to recognize the claimed illegality of the tax. The same multiplicity of suits described above would be present here.

(b) *State Statutory Remedy Only a Restricted One.*

The remedy of suit for refund under the Wyoming Statutes is a restricted one, since under the decision of the Wyoming Supreme Court in *Carton* v. *Commissioners,* 10 Wyo. 416, 438; 69 Pac. 1013, illegal taxes paid cannot be recovered under these statutes unless they were paid under duress of a warrant in the hands of a tax collector. Such a remedy is not the prompt, certain, complete and efficient remedy which must be available to defeat federal equity

jurisdiction. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288.

(c) *State Statutory Remedy Makes no Provision for Interest.*

The statutes quoted do not provide for the recovery of interest. Such a remedy is not adequate. *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393.

(d) *Preventing Cloud on Title.*

Another ground of equity injunctive relief present here is that the alleged illegal tax creates a cloud upon the title to respondent's property. It is alleged in the Bill (R. 7) and admitted in the Answer (R. 23) that the taxes levied constitute a lien upon respondent's property and, if not paid, a cloud upon respondent's title thereto. Decisions of this court establish equity jurisdiction in such cases. *Union Pacific Railway Company* v. *Ryan, Marshal of the City of Cheyenne,* and *City of Cheyenne,* 113 U. S. 516, was an action to restrain the collection of taxes illegally imposed. The equitable ground relied upon was that the lien of the illegal tax created a cloud on the railway company's title. The city urged the existence of an adequate remedy at law. Speaking of the taxpayer's remedy, this court said:

> "Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

In *Ohio Tax Cases* (*Ohio River and Western Railway Co.* v. *Dittey*), 232 U. S. 576, this court discussed cloud on title as a ground for equitable interference and at page 587 said:

> "The right to invoke equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real

estate of appellants, from the cloud of which they sought to free it by the bringing of these actions * *."

Other cases in point on the question of cloud on title are:

Shaffer v. *Carter,* 252 U. S. 37.
Wallace v. *Hines,* 253 U. S. 66.
Ogden City v. *Armstrong,* 168 U. S. 224, 237.
Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.

(e) *Law Remedy to Defeat Federal Equity Jurisdiction Must be Available in Federal Court.*

It should be remembered that once the justiciable stage of a controversy has been reached, the adequate remedy at law which will defeat federal equity jurisdiction must be one available on the law side of the Federal court, and not merely one available in the State courts.

Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.
Smyth v. *Ames,* 169 U. S. 466, 516.
Chicago, Burlington & Quincy R. R. Co. v. *Osborne,* 265 U. S. 14.
Franklin v. *Nevada-California Power Co.,* 264 Fed. 643, 645.

The jurisdiction of the Federal courts is determined by the Constitution and acts of Congress, and cannot be limited by State legislation. Where the necessary judicial facts exist and the case is of such a character as to require the exercise of the jurisdiction of a court of equity, the complainant may resort to the equity side of the Federal court, notwithstanding the fact that he has an adequate remedy in the State courts under State law.

Smyth v. *Ames,* 169 U. S. 466, 516.
Chicago, Burlington & Quincy R. R. Co. v. *Osborne,* 265 U. S. 14.
Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.

(f) *State Remedy by Appeal Does not Defeat Federal Equity Jurisdiction where Justiciable Stage Reached.*

The remedy by appeal provided in the State court by Wyoming Revised Statutes, section 115-512 (quoted in Petitioners' brief, pages 11-12 and reproduced in the appendix hereto) does not defeat federal equity jurisdiction, because if the appellate statutory functions are legislative, they cannot, under Article II of the Wyoming Constitution, be exercised by the State courts, and if they are judicial, the litigant, having requisite federal jurisdictional facts, and a recognized ground for equitable interference, has the right to resort to the Federal courts without pursuing his remedy in the State court.

Article II of the Wyoming Constitution, referred to above, is as follows:

> "The powers of the government of this State are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

This provision quite clearly limits the courts of Wyoming to the exercise of judicial functions. The legislative or administrative act was therefore complete with the entry of the order of the State Board of Equalization, fixing the value of respondent's property. The matter had reached the justiciable stage and the taxpayer had the right to institute this proceeding in the Federal court.

Bacon v. *Rutland R. R. Co.*, 232 U. S. 134.

Prendergast v. *New York Telephone Co.*, 262 U. S. 43.

Detroit & Mackinac Ry. Co. v. *Michigan Railroad Commission*, 235 U. S. 402.

Chicago and North Western Ry. v. *Bauman,* 69 Fed. (2d) 171 (8th Circuit case decided Feb. 13, 1934, certiorari denied April 9, 1934 ..... U. S. .....)

A remedy by appeal in a State court was held in *Wilson* v. *Illinois Southern Railway Company,* 263 U. S. 574 not to defeat federal equity jurisdiction.

Cases such as *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, where legislative and judicial powers are blended in one body, and where, therefore, the legislative powers must be exhausted before recourse to a federal equity proceeding, are clearly distinguishable.

Mathews v. *Rodgers,* 284 U. S. 521 and *Stratton* v. *St. L. S. W. R. R. Co.,* 284 U. S. 530, are distinguishable because the alleged multiplicity of suits there relied upon would not have involved identity of issues, but would have brought up different questions as to each different business in which a separate plaintiff was involved. The privilege tax complained of in *Mathews* v. *Rodgers* was one applicable separately to a number of different individuals. Each individual had one case possibly differing from each other individual's case. There was not therefore any multiplicity of suits in the true sense. In the instant case, it is the Chicago and North Western Railway Company's taxes only that are involved, and exactly the same questions would arise in each of four suits against four county treasurers. The *Stratton case,* unlike that at bar, did not present a situation involving multiplicity of suits. Neither the *Mathews case* nor the *Stratton case* had in it the element of cloud on title, as the taxes there involved were not of a character constituting a lien on property, but were privilege taxes and franchise taxes, respectively.

(g) *Bill States Sufficient Facts.*

The Bill of Complaint states the ultimate facts, in accord with Equity Rule 25, to the effect that "it shall be sufficient that a bill in equity shall contain * * a short and simple statement of the ultimate facts upon which the plaintiff asks relief * *." If *facts* are pleaded from which it appears that a multiplicity of suits would be necessary to pursue legal remedies, and which show that the taxes constitute a lien on plaintiff's property, it is those facts, and not mere conclusions of the pleader, which give the court jurisdiction.

De Witt v. *Hayes,* 2 Cal. 463, 56 Am. Dec. 352, 354.
Dennis v. *M. & M. Ry. Co.,* 137 Ala. 649, 97 Am. St. Rep. 79.
Town of Flagstaff v. *Gomez,* 242 Pac. 1003 (Ariz.).

In the case at bar the Bill alleges that a valuation was put upon respondent's property in Wyoming by the State Board of Equalization; that the valuation was grossly excessive and constituted a discrimination against the respondent; that the total valuation on respondent's property in Wyoming was, by the State Board, apportioned to each of the several counties; that the valuation so apportioned to each of the four counties was excessive; that the excessive valuation was certified to the four county assessors; that each of the four county assessors levied taxes upon the value certified to him by the State Board, and placed the tax so levied upon the assessment roll and certified the same to the four county treasurers for collection; that the four county treasurers threatened to levy, and unless restrained will levy distraint upon respondent's property and sell the same for the tax so levied on an excessive and discriminatory valuation; and that the illegal taxes levied constitute a lien upon respondent's property and a

cloud upon the title to the same. In addition it is alleged that respondent has no plain, adequate and speedy remedy at law. Except for the allegations of excessiveness of the tax and the discrimination charged, the allegations of fact above recited are admitted by the defendants (R. 12-27).

There can be no doubt that the facts alleged not only warrant but compel the conclusion that respondent was threatened with irreparable injury in the admitted cloud on its title; that it had to sue in equity to avoid the multiplicity of actions at law, and that it had no adequate remedy at law. The court, of course, will view the allegations of fact made in the Bill in the light of the Wyoming Statutes already referred to providing that, while a taxpayer who claims the tax assessed against him to be illegal, may pay the tax and prosecute a legal action for its recovery, he must bring his legal actions against the tax collectors, which in this case means that respondent, if it relies on its legal remedy, must pay to each of the four county treasurers the tax assessed in his county, and must then bring at least four actions at law to recover the illegal taxes paid. Considering the allegations of the Bill in the light of these statutory provisions, it is manifest that respondent's legal remedy by suit involved four separate law actions. The multiplicity of suits is thus apparent from the face of the Bill.

(h) *Present Case Clear Example of Greater Efficiency of Federal Equitable Remedy.*

The present case shows the efficiency of federal equity proceedings. Here were taxes of a complaining taxpayer in four separate counties but all growing out of a single assessment, made (as we shall show under part II of this Argument) as a result of intentional application of a wholly and demonstrably wrong principle and method amounting

to arbitrary action. By joining all the county treasurers in one equity action a multiplicity of suits is avoided and a cloud on respondent's title is prevented. With federal jurisdiction present because of diversity of citizenship and the requisite amount in controversy, and also because of a substantial controversy under the Commerce Clause and under the Fourteenth Amendment to the Federal Constitution, and with the equitable grounds already referred to, the path was clear for the United States District Court in one case to enjoin and correct the wrong of which complaint was made. Federal equity jurisdiction is clearly present.

II.

THE STATE BOARD'S USE OF TRACK MILEAGE AS AN ALLOCATING FACTOR WAS SUCH A WHOLLY WRONG PRINCIPLE AND METHOD, AS TO BRING ABOUT AN ARBITRARY AND INTENTIONAL OVERVALUATION OF RESPONDENT'S WYOMING PROPERTY AND IN EFFECT TO TAX ITS PROPERTY OUTSIDE WYOMING.

There is no controversy here as to the system value of respondent's property for the year in question. The sharp dispute is how much of that system value should be allocated to Wyoming. The propriety of using "traffic units" (ton-miles of freight and passenger-miles in the proportion that those in Wyoming bear to the system) as one factor and "use of rolling stock" (use in Wyoming in proportion to use on the system) as another factor is conceded. A dispute as to whether a third factor should be the proportion of gross revenue earned in the State (as urged by respondent), or a composite percentage of gross revenue and net revenue (as found by the Board) was resolved against respondent which accepted the court's conclusion on that point. The Board persisted in using track mileage as an allocating factor, which is the percentage that track

mileage in Wyoming bears to the track mileage of the system. It may be conceded that where conditions are fairly uniform throughout the system, track mileage is an approved method. But that method is arbitrary and unreasonable where conditions within and without the state differ widely. The effect then is to tax property outside the state under a mere pretense. Such action is an unwarranted interference with interstate commerce and a taking of properly without due process of law.

P. C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 421.
Fargo v. *Hart,* 193 U. S. 490.
Union Tank Line Co. v. *Wright,* 249 U. S. 275, 282.
Wallace v. *Hines,* 253 U. S. 66.
Southern Ry. v. *Kentucky,* 274 U. S. 76.

In the case at bar, as the trial court found, the parts of respondent's system within and without the state are not fairly uniform, but differ widely. As the Circuit Court of Appeals said (R. 155):

> "That finding (is) supported by substantial and virtually uncontradicted testimony."

In this aspect of the case it bears a striking resemblance to *Wallace* v. *Hines,* 253 U. S. 66. In that case the court said:

> "As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also

are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

The parts of Wyoming in which respondent's line is located are of the character in relation to its system that North Dakota was to the railroads involved in the *Wallace case.* In fact, the disparity between Wyoming conditions and those of the system in the instant case is even more pronounced than was that between North Dakota conditions and those of the railway systems involved in the *Wallace case,* as respondent's line "peters out," so to speak, at Lander, Wyoming, while those of the railroads involved in the *Wallace case* were transcontinentals which crossed the State in their through routes between the Mississippi Valley and the Pacific Coast.

The Circuit Court of Appeals in the decision sought to be reviewed summarized the vast difference between respondent's road in Wyoming and its system generally in the following succinct paragraph (R. 154-155):

"The court found that the railroad system embraces 8,180.20 miles of main line track of which 278.35 miles are located in Wyoming; but the quality, cost and value of such property within that state, measured by main line track, is greatly less than that throughout the system. That finding is sustained by substantial evidence. Conditions throughout the system are not substantially uniform. They differ widely. The company owns costly grade separations in Chicago, generally known as track elevations raising the main line grade twelve or fifteen feet above the street level to permit traffic in the streets without interruption. There are no such elevations in Wyoming. It has stone ballast in other states. There is none in Wyoming. Its bridges in some of the other states are of the expensive stone or stone arch type, while most of those in Wyoming are temporary in character, called pile trestles. Its station facilities in other states, particu-

> larly in Illinois, are extensive in capacity and expensive in character. Except for three or four, those in Wyoming are of temporary construction, some being car bodies and platforms. With a few exceptions, the rails used for yard and side track purposes in Wyoming are substantially lighter in weight, and consequently less in value, than those used in other states, notably Illinois, Wisconsin and Iowa. These differences are substantial. There is lack of uniformity in conditions throughout the system."

Ample evidence (in fact practically uncontradicted evidence) sustaining that position will be found in the record at pages 85 to 97. Even the dissenting judge in the Circuit Court of Appeals agreed that "the method of valuation adopted was illegal and should be condemned" (R. 161).

That intentional use of such a wholly erroneous factor under the circumstances shown here is more than a mere difference in valuation, and is an attempt to tax property outside the State and justifies a decree enjoining the excessive taxes resulting therefrom is well established by the decisions. Under such circumstances, it is not essential that the members of the Board be shown to have acted from fraudulent or improper motives.

Fargo v. *Hart,* 193 U. S. 490.
Wallace v. *Hines,* 253 U. S. 66.
A. T. & S. F. Ry. Co. v. *Sullivan,* 173 Fed. 456.
Taylor v. *L. & N. R. R. Co.,* 88 Fed. 350, 374 (Certiorari denied, 172 U. S. 647).

III.

THE TRIAL COURT CORRECTLY RESTRAINED THE COLLECTION OF THAT PART OF THE TAX DEMONSTRABLY GROWING OUT OF THE USE OF THE WHOLLY ERRONEOUS FACTOR.

In this case, as we have shown, the allocating factors "traffic units" and "use of rolling stock" were concededly correct. The composite of state proportions of gross and net revenue was upheld by the court as against respondent's contention that gross revenue alone should be used as that factor. Factors similar to these three are those in common use in *ad valorem* taxation of interstate railroads as they accurately reflect the relative use of the railroad plant in any given state. The only other factor used was the wholly erroneous "track mileage." The Board's order showed this (R. 51). The track mileage percentage was 3.29 per cent and was greatly out of line with the other factors used (R. 51). The amount by which the track mileage percentage increased the average ultimate factor was a plain and simple matter of arithmetic. Throwing out the wholly erroneous factor and using the others brought about a percentage which, when applied to system value, produced the proper value of respondent's property in the State. It was then a mere matter of computation to figure the amount by which the values apportioned to each of the four counties should be reduced proportionately. Thus the illegal excess of taxes was clearly apparent and it was that excess, and only that, which was enjoined. This is not a case for a long, drawn out and complicated revaluation. It is simply one where the results of the arbitrary action taken are clearly and mathematically separable, and where the court could end the litigation by a decree enjoining that which was illegal and requiring the prompt payment of that

which was due. Courts should be commended, rather than the reverse, for such effective and common sense disposition of controversies.

Petitioners' repeated references in their brief to the "consideration" by the Board of any other matters than those mentioned by the Board in its order, overlook the fact that *the things which the Board actually used* are shown definitely and affirmatively by its order (R. 51). This is borne out by the testimony of the member of the Board who did the figuring and who was petitioners' main witness (R. 108).

Statements in petitioners' brief to the effect that respondent's officers returned a Wyoming *value* of $8,281,950.00 in a report to the Board are incorrect. That figure was simply a "cost of reproduction new less depreciation" figure and was accompanied by exhibits made up on the same formula which the respondent claimed at the trial and by a specific claim that the fair cash value of its Wyoming property did not exceed $5,849,570.00 (R. 101, 102). The specific reservation commencing at the bottom of page 101 of the record and continuing on page 102 is a sufficient answer to any claim that respondent had ever reported or admitted any such value as $8,281,950.00. The Board recognized the fact that the reproduction figure so reported had nothing to do with fair cash value or value for tax purposes, by paying no attention whatever to it in the order fixing the valuation (R. 51), in which, as already pointed out, the Board showed exactly what it did use.

Conclusion.

Every substantial question of law involved in this case has been decided by this court over and over again. There is no new or doubtful question presented. The facts are substantially uncontradicted and have been decided in re-

spondent's favor by the District Court and that decision has been affirmed by the Circuit Court of Appeals. We believe that the application for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Illinois,
ROBERT R. ROSE,
Of Casper, Wyoming,
Counsel for Respondent.

APPENDIX.

Wyoming Revised Statutes, 1931:

SECTION 89-4201. Jurisdiction of district Courts. District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

SECTION 89-4202. Parties to actions to enjoin levy. Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and bene[illegible] the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action.

SECTION 89-4203. Parties to actions to enjoin collection. Actions to enjoin the col[illegible]ction of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments.

SECTION 115-311. Refunding taxes erroneously paid. In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation, shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall

not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth.

SECTION 115-512. Appeals from board.—Proceedings. Any person, persons, firm or corporation, who may feel aggrieved by the assessment or assessments by the board may take an appeal from the decision of the board to the district court of the county wherein the property or some part thereof is situated, where a trial *de novo* to the court shall be had.

The party or parties appealing shall, within sixty days after the decision of the board, file in the district court to which the appeal is taken a petition setting out the cause of complaint, and a copy of the records of the board, all duly certified by the secretary of said board, and copies of said assessment or assessments.

The party appealing shall at the time of filing such appeal enter into an undertaking to be approved by the clerk or judge of said district court, and to be given to the state of Wyoming in such an amount as the court or judge may fix, but in no case less than five hundred dollars ($500.00), and conditioned that the appellant shall prosecute the appeal without unnecessary delay, and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property, the assessment of which is in controversy.

The clerk of the court shall immediately upon filing of the appeal notify the secretary of the board under the seal of the court, and supply him with a copy of the petition.

It shall be the duty of the attorney general and the county attorney of the county to which the appeal is taken to represent the board in proceedings on the appeal.

All proceedings on appeal except as herein otherwise provided shall be under the provisions of the code of civil procedure, as in other civil cases.

FILE COPY

OCT 1 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9.

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, AS TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, AS TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, AS TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Illinois,
ROBERT R. ROSE,
Of Casper, Wyoming,
Attorneys for Respondent.

LOWELL HASTINGS,
Of Chicago, Illinois,
VINCENT MULVANEY,
Of Casper, Wyoming,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	Page
Opinions of the courts below	1
Statement of the Case	1
Pleadings	1
Orders	4
Argument	7
Evidence	7
Points, Authorities and Discussion	21
1. Jurisdiction—Multiplicity of Suits	22
2. Inadequacy of Legal Remedy	30
3. Remedy Must Be in Federal Court	34
4. Remedy under Wyoming Revised Statutes, 115-311 and 89-4201-4203, Inadequate	36
(a) Each such remedy involves multiplicity of suits	36
(b) Failure of Wyoming statutes to provide for payment of interest	39
5. Wyoming Revised Statutes, Section 115-512, Not Adequate Remedy	43
6. Cloud on Title	65
7. Sufficiency of Pleading	66
8. Railroad Valued as a Unit	71
9. Value of Carrier Property is Measured by Value of Use	72
10. Method of Fixing Railroad System Value	73
11. Miles-of-Road Improper Factor Arbitrarily Used	76
12. Findings of Fact Conclusive on Arbitrary Action of Board	85
13. Arbitrary Over-Valuation Violates Constitutional Rights	87
14. Value and Cost	96
Conclusion	97
Appendix	99

Cases Cited.

American Bank & Tr. Co. v. Fed. Reserve Bank, 262 U. S. 643 85
A. T. & S. F. Ry. Co. v. Sullivan, 173 Fed. 456, 470 ..... 30, 32, 87
Atlantic Coast Line Co. v. Daughton, 262 U. S. 413 57
Aurora, City of, v. Schoberlin, 230 Ill. 496, 82 N. E. 860 ..... 43, 54
Bacon v. Rutland R. R. Co., 232 U. S. 134, 137 ..... 44, 59
Baker, Charles H. v. John W. Schofield, 243 U. S. 114. 85
Bauman v. C. & N. W. Ry. Co., ... U. S. ...., 54 S. Ct. 641 ..... 36, 44, 62, 94
Bodkin v. Edwards, 255 U. S. 221 85
Bohler, Tax Collector v. Callaway, 267 U. S. 479 87
Boise Art. H. & C. Water Co. v. City of Boise, 213 U. S. 276 ..... 30, 31
Boyce v. Grundy, 3 Pet. 210, 215, 217 30
Brewer Elliott Oil & Gas Co. v. U. S., 260 U. S. 77 85
Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125 30
Bucknum v. Johnson, 21 Wyo. 26, 127 Pac. 904 ..... 43, 49
Bunton v. Rock Springs Grazing Assn., 29 Wyo. 461, 215 Pac. 244 ..... 87, 95
Carroll v. Safford, 3 How. 441 22
Causey v. U. S., 240 U. S. 399 85
C. & N. W. Ry. Co. v. Bauman, 69 Fed. (2d) 171, 176 (certiorari denied, Bauman v. C. & N. W. Ry. Co., ... U. S. ...., 54 S. Ct. 641) 34, 35, 44, 61, 87, 93
C. & N. W. Ry. Co. v. Eveland, 13 Fed. (2d) 442, 446 ..... 21, 73, 75, 87, 91, 96
C. & N. W. Ry. Co. v. Rowley, 1 Fed. Sup. 729 1
C. B. & Q. R. Co. v Osborne, 265 U. S. 14 ..... 34, 48, 52
City Bank Farmers Trust Co. v. Schrader, 291 U. S. 24 ..... 44, 63, 64
C. C. C. & St. L. v. Backus, 154 U. S. 439 ..... 72, 74

C. S. Ry. Co. v. Guenther, 19 Fed (2d) 395, 400..... 96
Cleveland v Cleveland City Ry. Co., 194 U. S. 517.... 22
Cruickshank v. Bidwell, 176 U. S. 73..... 22
Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903 26
Davis v. Wakelee, 156 U. S. 680..... 30
Dawson v. Kentucky Dist. & Whse. Co., 255 U. S. 288 .....30, 34
Dennis v. M. & M. Ry. Co., 137 Ala. 649, 97 A. S. R. 69 .....66, 68
Detroit v. Detroit C. S. Ry. Co., 184 U. S. 368..... 22
Detroit & Mackinac Ry. Co. v. Michigan R. R. Commission, 235 U. S. 402.....44, 59
DeWitt v. Hayes, 2 Cal. 463, 56 A. D. 352, 354.....66, 67
Duluth v. Railroad & Warehouse Commission, 209 N. W. 10 .....43, 62
Elliott on Appellate Procedure, sec. 15.....43, 53
Equity Rule 25.....66, 67
Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63.... 42
Evans, Ex Parte, 72 S. C. 547, 52 S. E. 420.....43, 53
Eveland v. C. & N. W. Ry. Co., 273 U. S. 680..... 93
Fargo v. Hart, 193 U. S. 490.....71, 76, 78
Farm Inv. Co., The v. Carpenter, 9 Wyo. 110, 61 Pac. 258 .....44, 55
Flagstaff, Town of v. Gomez, 242 Pac. 1003 (Ariz. 1916) 66, 67, 68
Gilson v. U. S., 234 U. S. 380..... 85
Goldsmith v. Standard Chemical Co., 23 Fed. (2d) 313. 44
Gormley v. Clark, 134 U. S. 338..... 30
Greene v. L. I. R. Co., 244 U. S. 499.....22, 26, 87
Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713..... 25
High on Injunctions, 4th Ed., Sec. 12, p. 18..... 22
Hill v. Wallace, 259 U. S. 44.....22, 27

Hopkins v. Southern California Tel. Co., 275 U. S. 393 ..... 36, 40, 42
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239 ..... 87, 90
Kilbourn v. Sunderland, 130 U. S. 514 30
Lee v. Bickell, 292 U. S. 415, 78 L. Ed. 895, 898, 54 S. Ct. 727 ..... 22, 28
Lewis v. Cocks, 23 Wall. 466 ..... 30, 31
Lively v. M. K. & T. Ry. Co., 102 Tex. 545, 120 S. W. 852, 856, 858 87
L. & N. R. Co. v. Bosworth, 230 Fed. 191 (Dist. Ct. Ky.) 87
McConihay v. Wright, 121 U. S. 206 30
M. & O. R. Co. v. Schnipper, 31 Fed. (2d) 587 (Dist. Ct. E. D. Ill.) 22, 25, 72, 73, 74, 76, 87
Mackin v. Taylor County Court, 38 W. Va. 338, 18 S. E. 632 ..... 43, 54
Martin v. Baltimore & Ohio R. Co., 151 U. S. 673 ..... 66, 69
Matthews v. Rodgers, 284 U. S. 521, 76 L. Ed. 447 ..... 22, 29, 63
Midwest Hotel Co. v. State Board of Equalization, 39 Wyo. 461, 273 Pac. 696 ..... 43, 46, 48, 49
Mills, Henrietta v. Rutherford, 281 U. S. 121 34
Munn v. Des Moines National Bank, 18 Fed. (2d) 269 (C. C. A. 8) 26
Nutt v. Ellerbe, 56 Fed. (2d) 1058, 1062 ..... 36, 41
Oelrichs v. Spain, 15 Wall. 211 22
Ogden City v. Armstrong, 168 U. S. 234 65
Ohio River & Western Ry. Co. v. Ditty, 232 U. S. 576, 587 65
Parker v. Winnipiseogee Lake Cotton Co., 2 Black 545. 22
People v. C. B. & Q. R. Co., 300 Ill. 399, 133 N. E. 325, 326-327 87
Philadelphia & Reading Coal & Iron Co. v. School District, 156 Atl. 75 (Pa.), 76 A. L. R. 1007 42

Pittsburgh C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 421 .....8, 72, 73, 76, 77, 96, 97
Prendergast v. N. Y. Telephone Co., 262 U. S. 43....44, 60
Prentis v. Atlantic Coast Line Co., 211 U. S. 210....44, 59
Proctor & Gamble Dist. Co. v. Sherman, 2 Fed. (2d) 165, 166.....36, 40
Railroad & Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 273 U. S. 625.....43, 50, 52, 62
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38, 40 .....22, 26, 36, 40
Risty v. C. R. I. & P. Ry. Co., 270 U. S. 378..... .....34, 35, 47, 58, 65
Rowley v. C. & N. W. Ry. Co., 68 Fed. (2d) 527..... 1
Schleisinger v. State of Wisconsin, 218 N. W. 440, 57 A. L. R. 352..... 42
Shaffer v. Carter, 252 U. S. 37..... 65
Sioux City Bridge Co. v. Dakota County, Neb., 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979.. .....25, 87, 89
Smith v. Reeves, 178 U. S 436..... 36
Smyth v. Ames, 169 U. S. 466, 516..... 34
Southern Ry. Co. v. Kentucky, 274 U. S. 76.....76, 96
Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389-393..... 30
Storey's Commentaries on the Constitution 3, p. 626.43, 53
State v. Burdick, 3 Wyo. 587, 28 Pac. 146.....44, 55
State ex rel. Wycoff v. Ross, 31 Wyo. 500, 228 Pac. 636 .....44, 55
Stratton v. St. L. S. W. Ry. Co., 284 U. S. 530.....22, 29
Sullivan v. Portland, etc., R. Co., 94 U. S. 806.....30, 31
Taylor v. L. & N. R. Co., 88 Fed. 350, 364-365, 373, 374 (C. C. A. 6) 87, 90
Taylor v. Secor, 92 U. S. 575.....73, 74, 76
Temmer v. Denver Tramway Co., 18 Fed. (2d) 226, 229 (C. C. A. 8).....73, 75, 96

Union Pac. Ry. Co. v. Ryan, Marshal of City of Cheyenne, 113 U. S. 516.....65, 71
U. P. Ry. Co. v Board of Commissioners, Weld County, 247 U. S. 282 .....22, 30, 31, 50, 56
Union Tank Line Co v. Wright, 249 U. S. 275.....76, 80
Wallace v. Hines, 253 U. S. 66.....65, 71, 76, 82
Walla Walla v. Walla Walla Water Co., 172 U. S. 1... 30
Waterman Co. v. Modern Pen Co., 235 U. S. 88..... 85
Western Union Tel. Co. v. Taggart, 163 U. S. 1..... 96
Williams v. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 180.. 30
Wilson, Collector v. Ill. S. Ry. Co., 263 U. S. 574..22, 23, 25

CONSTITUTIONAL PROVISIONS CITED.

United States Constitution, Fourteenth Amendment 82, 87, 88
Article I, Section 28, Wyoming Constitution.....87, 88
Article II, Section 1, Wyoming Constitution...43, 44, 46, 54
Article V, Sections 1 and 10, Wyoming Constitution 43, 44, 45, 53, 54, 55
Article XV, Sections 10 and 11, Wyoming Constitution 73, 76, 77, 87, 88, 96

STATUTORY PROVISIONS CITED.

Section 30-1103 Wyoming Revised Statutes.....36, 38
Section 30-1113 Wyoming Revised Statutes.....36, 38
Section 89-302 Wyoming Revised Statutes..... 43
Sections 89-4201-4203 Wyoming Revised Statutes..... .....25, 36, 37, 39, 70
Sections 91-306-310 Wyoming Revised Statutes..... .....43, 49, 50, 96, 97
Section 115-308 Wyoming Revised Statutes.....36, 38
Section 115-311 Wyoming Revised Statutes.....36, 37, 39
Section 115-512 Wyoming Revised Statutes..... .....43, 45, 47, 49, 50, 63, 64
Section 115-515 Wyoming Revised Statutes..... 52
Sections 115-1005-1006 Wyoming Revised Statutes.... .....36, 38, 39
Sections 115-1804, 1809 Wyoming Revised Statutes.... .....43, 51, 73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9.

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, AS TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, AS TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, AS TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

OFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW.

C. & N. W. Ry. Co. vs. *Rowley,* 1 Fed. Sup. 729; *Rowley* v. *C. & N. W. Ry. Co.* 68 Fed. (2d) 527.

STATEMENT OF THE CASE.

PLEADINGS.

This is a suit brought by the Chicago and North Western Railway Company against the County Treasurers of four counties in the State of Wyoming to enjoin the collection of

taxes by the defendant County Treasurers upon valuations fixed by the Wyoming State Board of Equalization upon respondent's property located in the four counties, claimed by the respondent to be excessive and to have been arrived at by the State Board by arbitrary methods amounting to "fraud in law" (R. 157) and by the application of a wholly wrong principle of valuation.

Respondent's bill in equity (R. 1-8) alleges that respondent is an Illinois corporation; that petitioners are respectively the County Treasurers of Converse, Fremont, Natrona and Niobrara Counties, in the State of Wyoming, and that the amount involved as to each county exceeds the sum of $3,000.00. (R. 1 & 2). It is alleged that the valuation of $7,881,003.94, fixed by the State Board of Equalization upon respondent's property in the four Wyoming counties, was $2,031,433.94 in excess of the actual value of the property; that respondent's property had each year over a period of not less than five years been systematically and intentionally valued by the State Board at a figure approximately $2,000,000.00 in excess of its actual value; that in the year 1931 respondent's main-line track within the state was 278.35 miles; that the Wyoming property was worth only approximately one-half as much as the average mile of track; that these facts were, and during all the five-year period prior to 1931 had been, known to the State Board, and that the State Board, after fixing the system value of respondent's operating property at $375,285,902.00, arbitrarily and unlawfully fixed the value of the Wyoming property by using as one of the factors 3.29 per cent, representing the percentage of the total main-track mileage located in the State of Wyoming, without taking into account the inferior character and value of the Wyoming property as compared with the property located throughout the system; and that the over-valuation and resulting discrimination constitute a violation of respondent's rights

under the Fourteenth Amendment to the Federal Constitution. (R. 3, 4, 5)

The bill of complaint further alleges that while respondent's property was valued by the State Board at approximately 33⅓ per cent in excess of its actual value, the property of taxpayers generally throughout the state was assessed at approximately 60 per cent of its actual value, all with the fraudulent intent and purpose of placing upon respondent more than its just share of the taxes of the state and of discriminating against the respondent in violation of its rights under the provisions of the Federal Constitution, already mentioned. (R. 5)

Respondent's bill further alleges that the excessive valuation fixed by the State Board was by that Board apportioned to the various counties in which respondent's property was located, and certified by them to the respective County Assessors and by them placed upon the assessment rolls of the several counties, and that unless restrained the petitioners would distrain and sell respondent's property for the taxes claimed, and also that the taxes levied constitute a lien upon respondent's property and a cloud on its title. The bill contains the allegation that respondent, prior to the institution of the suit, had tendered to the respective petitioners the amounts due and admitted by respondent to be due them, and alleges that respondent has no adequate remedy at law. (R. 6, 7)

Petitioners' answer (R. 12-27) admits the allegations as to diversity of citizenship and the official capacity of the petitioners, denies the over-valuation of respondent's property, alleges that in fact it was greatly under-valued, admits that the State Board of Equalization considered the percentage of miles-of-road factor in arriving at the valuation of respondent's Wyoming property, admits the knowledge of the State Board as to the value and characteristics

of the respondent's Wyoming property as compared with its property throughout the system, and denies respondent's allegations as to discrimination.

The answer admits the valuation fixed upon respondent's property by the State Board as alleged in the bill, admits the allocation of the same to the several counties, the levy of taxes thereon in the amounts alleged, the certification by the Assessors to the Treasurers, the threatened collection and distraint by the Treasurers of respondent's property, and that the taxes levied constitute a lien on respondent's property and a cloud on the title thereto.

Orders.

Before the institution of the suit, the respondent tendered to the petitioners the amounts of taxes admitted by the respondent to be due, and upon presentation of its bill the Court entered a temporary restraining order (R. 8-10), fixing the amounts to be paid forthwith by the respondent to the petitioners, which payments were made, and later upon hearing an order for temporary injunction was issued. (R. 10-12) Upon conclusion of the trial, the case was taken under advisement and August 30, 1932 the trial judge filed his memorandum opinion (R. 27-32) denying jurisdiction, and upon re-argument of the question of jurisdiction and the re-submission of the case the trial judge, on November 9, 1932, entered his memorandum opinion (R. 32-43) holding that the Federal Court had jurisdiction in equity and that the respondent was entitled to the relief sought.

On December 17, 1932, the Court made and filed its findings of fact, conclusions of law and decree. (R. 43-48) It was specifically found by the Court, in addition to the jurisdictional facts as to diversity of citizenship and the amount involved, that respondent's main-track mileage in the State of Wyoming was 278.35 miles, being 3.29 per cent of the

entire system main-track miles; that the quantity, quality, cost and value of respondent's Wyoming property, measured upon the basis of miles-of-main-line track, was greatly less than throughout its system, which fact was well known to the State Board when it placed the value of $7,881,003.94 upon respondent's Wyoming property; that in arriving at the valuation of the Wyoming property the State Board first determined the value of respondent's system operating property to be $375,285,903.00 and that in arriving at the value of the Wyoming property the Board used as a factor the figure 3.29, representing the percentage of respondent's main-line-track mileage located within the state, without taking into account the fact that respondent's property in the State of Wyoming, measured on a mileage basis, was greatly less in quantity, quality, cost and value than the portion of its operating system located outside the state. (R. 45) In an opinion upon which the findings were based, the Court said (R. 41) that the use of the mileage factor by the Board "with the true facts before it, amounted to an arbitrary and unreasonable method, transcending plaintiff's constitutional rights".

The Court also found that the figure 1.89, representing, according to the testimony, the composite of the percentage of gross and net revenue within the state, was a mathematical error and that the figure should be 1.79. (R. 45)

The Court found that respondent's evidence failed to show an intentional and systematic under-valuation or omission of property other than that of respondent (R. 45); that the aforesaid valuation as fixed by the State Board was certified to the respective County Treasurers in the amount set out in the findings, which amounts were spread upon the county assessment rolls and by the Assessors certified to the petitioners for collection in the amounts specified in the findings. (R. 45-46).

The Court found, as conclusions of law, that the respondent had no adequate legal remedy (R. 46); that the trial court had jurisdiction to grant the equitable relief prayed for (R. 46); that the using of the percentage of main-line track located in the state as a factor in determining the value of respondent's Wyoming property without taking into account the difference in the character, quantity, quality, cost and value of the Wyoming property as compared with its property throughout the system constituted an arbitrary and unreasonable method and the application of a wholly wrong method and principle of determining the value of the Wyoming property. (R. 46).

The Court found that the State Board had properly used the traffic-units factor, represented by 1.58 per cent, and the rolling-stock factor, represented by 1.65 per cent; that the percentage 1.89 used by the Board, representing the operating-revenue factor, should be mathematically corrected to 1.79 per cent; that the average of the three percentages was 1.673, which, applied to the total valuation of $375,285,903.00, determined the actual value of respondent's Wyoming property to be $6,278,534.14, and the property to have been overvalued by the State Board to the extent of $1,602,468.90, constituting a substantial and arbitrary overvaluation. (R. 46, 47)

The decree ordered the payment by the respondent to the respective County Treasurers of the additional amounts therein specified, and permanently enjoined the petitioners from collecting or attempting to collect any additional amounts. (R. 47, 48)

ARGUMENT.

Evidence.

We desire to point out somewhat in detail the evidence in the case showing that the State Board of Equalization in arriving at the value of plaintiff's Wyoming property actually used as a factor the percentage of the system main line track located within the state without taking into account the fact that the character, cost and value of the average Wyoming mile is greatly and glaringly less than that of the system mile; and also the evidence showing that the actual value of plaintiff's Wyoming property was approximately two million dollars less than the value fixed upon it for taxation purposes by the State Board; and evidence showing that the plaintiff's property was substantially and arbitrarily over-valued to the extent of about two million dollars each year over a period of more than five years, notwithstanding the fact that all the information as to the actual value of the property was from year to year presented by the plaintiff to the State Board of Equalization, and notwithstanding that the true and uncontradicted facts were thus clearly before the Board.

First, the evidence as to the use of the miles of road factor: The question seems to have been settled by the findings of the trial court in which, in the seventh paragraph (R. 45) it is recited that, having determined the system value of plaintiff's operating property to be $375,285,903.00, the Board "adopted and used as a factor the percentage of plaintiff's main line track located in the State of Wyoming, to-wit, 3.29%, without taking into account the fact that plaintiff's property in the State of Wyoming measured on a mileage basis, is and was greatly less in quantity, quality,

cost and value than the portion of its operating system located outside the state of Wyoming''.

It would have been nearly impossible for the trial court to have come to any other conclusion; the order of the Board itself (R. 49-51) recites that the ''percentage of miles of railroad in Wyoming, 3.29%'', was used as one of four factors producing the average of 2.10% and that the system value of $375,285,902.00 was multiplied by 2.10% to obtain the figure of $7,881,003.94 which was, by that method, fixed as the value of plaintiff's property; and although there was some discussion in the evidence of other factors ''considered'' (R. 113)—for it was not contended by any witness that any other factors were actually ''used''—there is no other combination of figures mentioned in the evidence by which the figure determined by the Board to be the value of plaintiff's Wyoming property could have been arrived at.

Mr. McWhinnie, the member of the State Board who, according to the testimony in the case, had most to do with the fixing of the value of plaintiff's property, insisted throughout his testimony that the miles of road factor represented by the figure 3.29% was actually used (R. 110, 111, 112, 122, 124)—and in his testimony he distinguishes between the use of a factor and the mere consideration of it as a sort of check-up or verification of the result obtained. (R. 110, 111) It makes no difference what factors were ''considered'' by the Board, the only material inquiry being as to what factors were actually ''used'' by it in arriving at the disputed valuation. *Pittsburgh C. C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421.

Mr. McWhinnie, in explaining how the figure $7,881,003.94 was arrived at says that the Board took the traffic units and use of rolling stock factors as submitted in plaintiff's return, then took as a third factor the figure 1.89, rep-

resenting a composite of gross and net revenue and proceeds: "I added the percentage of the track mileage and taking those *four* factors, the mean average of which is 2.10% of the whole property that should be allocated to Wyoming. We added the mileage, the miles of main track, to arrive at that ratio. I presented it to the Board and they agreed that they thought that was very fair and liberal with the plaintiff. It makes the amount of $7,881,004. (which in the reporter's transcript of the evidence was corrected by the witness to read $7,881,004.94, original transcript p. 224) 2.10%, the *final percentage figure.*" (R. 110).

Again, (R. 111): "We used the value of the miles of main line track in Wyoming of the plaintiff as compared to the value of the main track of the system as *one of our four factors*" and again (R. 112): "We accepted two of the factors that they (the plaintiff) presented and half of the other one, and we added one factor to balance the account as we thought fair for Wyoming."

On cross-examination, Mr. McWhinnie testified as follows (R. 124): "In our four factors we took traffic units, 1.58, as one of our four factors. * * * We also used the factor 1.64, use of rolling stock. We also used a composite of the gross and net revenue. * * * I added the fourth factor of 3.29 and then got 8.30 and divided by four and got 2.075". It should be noted here, perhaps, that although the order (R. 51) uses the language "net operating revenues 1.89%", as one of the four factors Mr. McWhinnie explained in his testimony that the words "net operating revenues" were inadvertently used and that the factor actually used was a composite of the net and gross operating revenues (R. 110) represented by the corrected figure 1.79 instead of 1.89 and with the correction of this figure the total of the four factors was 8.40 instead of 8.41 and the average of the four was 2.075 instead of 2.10 (R. 124).

It is evident from this testimony and from the findings of the trial court on the point that the Board actually used the percentage of main line miles of road as a factor in arriving at the valuation complained of.

Mr. McWhinnie, in his cross-examination, testified as to certain data considered by the members of the Board for the purpose of satisfying themselves that the figure already arrived at was a correct figure and at the request of the Court, Mr. McWhinnie prepared a tabulation which was introduced as defendants' Exhibit 7 (R. 113-117). Plaintiff's Exhibit "W", prepared by Mr. Balch and explained in his testimony on rebuttal (R. 126-133) shows conclusively that the figures appearing in Mr. McWhinnie's tabulation were not used in such a way as to clearly or even intelligently reflect the value of plaintiff's property and that when adjusted in such a way as to bear at all on the value of plaintiff's property they show such value to be more than one million dollars less than the figure fixed by the State Board.

We come now to a consideration of the evidence to show that the actual value of plaintiff's property was approximately two million dollars less than the valuation fixed by the State Board.

Most of the testimony on this point was given by Mr. C. F. Balch, now and for many years past the statistician for the plaintiff company. Mr. Balch, in his testimony explained the generally approved method and the method employed by the railroad company in this case, of arriving at the value of the company's system operating property and the method of allocating to the state a proper proportion thereof by the use of factors reflecting the extent and value of the use. The system value is arrived at by first taking a five year average of the market value of stocks and bonds from which is subtracted the value of the Company's non-operating property locally assessed. Then a five-year average of the income capitalized at 6% is taken, and added.

Dividing the sum of these two by two is done in order to secure an average and this figure is the system value (R. 52). This method has generally been approved by the courts and indicates more accurately than any other the value of the entire operating system.

The factors used to determine the proportion of the property located within the state and therefore the value of that property are the percentage of traffic units (ton-miles of freight, plus passenger miles), the percentage of rolling stock used and the percentage of operating revenues (R. 55, 56). The value of any property, of course, is determined by the extent and value of its use, and these factors more accurately than any others, determine the extent and value of the use of the company's property located within a particular jurisdiction. The percentage of traffic units within the state is 1.58, and the percentage of rolling stock is 1.65. Both these figures were submitted by the plaintiff in its tax return and accepted, as was the system value figure, by the State Board. For the gross operating revenue factor, the State Board substituted a composite of the gross and net, represented, as figured by the Board, by the figure 1.89. This figure, however, was corrected by Mr. Balch at the trial to 1.79, and the correction was agreed to by Mr. McWhinnie for the State Board (R. 124). To these three factors as already noted the State Board added the figure 3.29 representing the percentage in Wyoming of the system main line track. It was the use of this factor that the court held to be arbitrary and unlawful (R. 46).

In Exhibits "F" to "F-5" (R. 55) and in his accompanying testimony (R. 56-57) Mr. Balch shows the result of the use of the three factors (omitting track mileage) and the comparison of these factors with the train miles factor, which is sometimes used, and shows that while the average of the three factors is 1.473, the use of the train miles factor percentage is only 1.39.

Exhibit "G" (R. 58-59) shows the method by which the system value was arrived at and also the value of the Wyoming property by the use of the allocating factors already mentioned. The figures in the first column show the system value for the years from 1926 to 1930 by the use of the market value of stocks and bonds method and the average of the five years is $385,800,085.00. The assignment to the state of Wyoming on the basis of the traffic units, operating revenues and use of rolling stock factors already mentioned shows the value of the Wyoming property for the five year average to be $6,016,881. The second section of the exhibit shows exactly the same information arrived at by the use of the capitalization of income method. This shows the system value for the years to be $364,771,720.00 and the value of the Wyoming property, arrived at by the use of the three allocating factors to be $5,682,259.00. Either of these is a generally approved method but to be more accurate we have used them both with the result that the value of the Wyoming property is shown to be ($6,016,-881.00 plus $5,682,259.00 = $11,699,140.00 ÷ 2) $5,849,-570.00. This figure, arrived at by generally approved methods, represents the actual value of the company's property for the year 1931 (R. 60-61).

The testimony already discussed shows what the actual value of the company's property in Wyoming was in 1931, the figure being $5,849,570.00 as determined by methods reflecting value as distinguished from cost, value, not cost, being the basis upon which, under the Wyoming constitution and statutes, assessments are to be levied.

Plaintiff used in evidence, however, a number of tabulations and testimony relating to them to show that, even upon the basis of relative cost or the distribution of the amount of property and the percentage of the property located within the state, the value as fixed by the State Board

is grossly excessive. Two of these exhibits are "H-2" and "H-4" (R. 61-62), in each of which use is made of the appraisal made by the I. C. C. in 1917 and adjusted to December 31, 1930; these figures, it is understood of course, being based upon cost rather than value. The first exhibit shows the amount of property expressed in dollars for each of the years from 1926 to 1930, both inclusive, and shows the system average for the five years to be $639,746,926.00 and the Wyoming average to be $11,767,752.00, the latter figure being 1.84% of the former. The table shows that in 1930, 1.75% of the amount of plaintiff's operating property was located within the state of Wyoming; the system value as already shown and not disputed in this case was $375,285,902.00 and only 1.84% of the property representing that value was located within the state.

Exhibit "I" (R. 63, 64) shows the earnings per mile of road in each state, the freight traffic density, the passenger density, the two combined, and then the amount of rolling stock per mile of road—all relating to the year 1930 only. The operating revenue runs from $44,932.00 per mile in Illinois to $6,844.00 per mile in Wyoming, the average of the entire line being $15,373.00 per mile and of the entire line outside Wyoming $15,663.00 per mile. So that the earnings per mile in Wyoming were only 44.52% of the average earnings per mile of the entire line; in other words, a mile of road in Wyoming earned 44.52% of the average system mile. To put it another way, it required 2.25 miles of road in Wyoming to earn as much as one average system mile; and it required 2.29 miles of road in Wyoming to earn as much as one average mile of road in the other eight states.

By the same computation on the basis of freight traffic units the system average was 895,012 tons per mile of road, while the average in Wyoming was only 420,687 tons, and for the entire system, excluding Wyoming, 911,152, so that

the average mile of road in Wyoming handled only 48.12% as much traffic as the average system mile.

The average passenger units throughout the system for the year 1930 was 98,411; in Wyoming it was 6,673. The average for the whole road, excluding Wyoming was 101,-532. So that the average Wyoming mile carried only 6.77% of the average system mile. In other words, it required 14.75 miles of road in Wyoming to carry as many passengers one mile as were carried by the average system mile of road.

The average of the combined freight and passenger traffic units per mile was 993,423 and in Wyoming it was 427,360, the latter figure being only 43.02% of the former; in other words, it required 2.325 miles of road in Wyoming to handle as many traffic units as the average system mile.

The average rolling stock used for the entire line per mile of road was 15,107, while in Wyoming it was only 7,060, the latter figure being 46.73% of the former (R. 63-64).

The application of these figures is shown in Exhibit "J-1" (R. 64-65). On the basis of these figures the average mile of road in Wyoming should be worth only $19,858.00 as compared with the average system mile of $44,368.00 and the total of the 278.35 miles should be only $5,527,-474.00, which is $2,353,924.94 less than the valuation as fixed by the State Board.

On a five year average (Exhibit "J-1" covering only the year 1930) upon a consideration of the same characteristics the average Wyoming mile is shown to be worth only $21,-024.00 and the entire Wyoming miles only $5,852,030.00 which is $2,028,973.00 less than the valuation fixed by the State Board. (R. 65.)

Since, as already suggested, the value of property is to be determined by the value of its use, it is evident from the data shown in Exhibits "I" and "J-1" that the average

Wyoming mile, measured by the value and extent of its use, is worth substantially less than 50% of the average system mile, from which it necessarily follows that the use by the State Board of the figure 3.29, representing the percentage of main track mileage within the state does not even approximately reflect the actual value of the plaintiff's Wyoming property.

Transportation train miles is used by some of the railroads in some states as an allocating factor, and, with the view of showing that its non-use by the plaintiff did not result to the disadvantage of the defendants, plaintiff introduced in evidence plaintiff's Exhibit "K" (R. 66) from which it appears that in the year 1930 the use of the transportation train miles factor would have produced in Wyoming the figure 1.39% while over the five year period it would have produced 1.51%, both of which are considerably less than the figures representing the factors actually used.

Exhibit "L" (R. 68, 69) shows the ratios of performance or use of the company's property in the various states as compared with the same in Wyoming. To illustrate, 9.78% of the system miles of road are within the state of Illinois while 3.29% are in Wyoming. Notwithstanding the fact that the number of miles operated in Illinois is only about three times the number operated in Wyoming, 29.03% of all the traffic of the system is carried within the state of Illinois while only 1.42% is carried in Wyoming. The figures as to the other states are shown on the exhibit and demonstrate that, measured by the three factors, plaintiff's property in all the important states is worth much more per mile than the Wyoming property.

Plaintiff introduced Exhibit "M-6" (R. 70) relating to freight traffic statistics. This exhibit shows that the tons per mile of road originating in Wyoming is 17.95% less

than on the average system mile, that the tons received from connecting carriers is 81.27% less than on the average system mile and that the total tons carried is 40.52% less than the average system mile. (R. 70-72).

Plaintiff's Exhibit "P-1" shows that in 1930 the net system railway operating income was only 66.49% of that of 1929 and in 1931 it fell to 23.92%. In 1931 the total net operating income of the company throughout its system was only $6,272,136.00, while the fixed interest and funded debt charges for that year were $16,178,907.00 (R. 72).

Plaintiff's Exhibit "Q-1" shows that the market value of the company's securities from January to November, 1931, decreased $197,757,159.00. (R. 72)

The data contained in these two exhibits are very significant in view of the fact that during the three year period the valuation fixed by the State Board upon the company's Wyoming property was only slightly reduced. In three years the very substantial net operating income of 1929 had largely disappeared and in 1931 there was a deficit of approximately ten million dollars. In the same period of time there was a drop of almost two hundred million dollars in the market value of the company's securities. These figures reflect a vast depreciation in value which was entirely ignored by the State Board in its conclusions.

Exhibits "R-1, R-3, R-5, R-7, R-9, R-11, R-13, R-15, R-17 and R-18" (R. 72-75) constitute a statement of the appraisal made of the company's operating properties by the I. C. C. under the Valuation Act of 1913 (49 U. S. C. A. 19a), based on the cost as of June 30, 1917, plus the net additions to December 31, 1930. The system appraisal as of December 31, 1930 was $669,198,216.00. The appraisal of the property located in Wyoming was $11,724,126.00, including a proper allocation of equipment. The property

located in Wyoming was 1.75% of the whole. The Wyoming property was appraised at $42,120.00 per mile, while the entire property was appraised at $79,813.00 per mile. In other words on the cost basis used by the I. C. C. the average Wyoming mile of road is worth only 52.77% of the average system mile. Taking 52.77% of 3.29% (the latter figure representing the percentage of the system main line miles located in Wyoming) we have 1.736 as representing the percentage of the system value located in Wyoming on the basis of the I. C. C. appraisal.

If the I. C. C. appraisal figures are to be used at all, since they do not represent value but are based upon the cost, or in other words, the amount of property measured in dollars, and since the criterion of tax valuation under the Wyoming Constitution and Statutes is actual value rather than cost, the I. C. C. figures to be of any assistance whatever must take into account the difference between the amount of property in, or the cost of the average Wyoming mile, and the amount of property or cost of the average system mile.

The operation just referred to produces the figure 1.736 as representing the percentage of the system value located in Wyoming on this basis. If to the factors 1.58, 1.65 and 1.79 there is added the correct factor on the I. C. C. appraisal of 1.736 and the sum of these factors is divided by four the average produced is 1.689% which, applied to the system value of $375,285,903.00 produces a figure of $6,338,578.88, representing on this basis the value of the company's Wyoming property, which figure is $1,542,425.06 less than the value as fixed by the State Board.

Exhibit "R-11" shows the system value of the company's operating properties to be 60.3% of the I. C. C. appraisal, and Exhibit "R-13" contains the same information applied to the state of Wyoming, showing the

value of the Wyoming property to be only 56.08% of the I. C. C. appraisal.

Exhibits "R-15", "R-17" and "R-18" show that on the basis of earning power and with relation to the I. C. C. appraisal, the value of the company's property in Wyoming is 1.47% of that of the entire line which is less than the value as figured by the company by the use of the three factors already discussed.

Using the figure 1.47 as the fourth factor with the other factors 1.58, 1.65 and 1.79 and dividing the sum by four produces an average ratio of 1.622 which applied to the system value of $375,285,903.00 indicates the value of the Wyoming property on this basis to be $6,087,137.33 which is $1,793,866.62 less than the value as fixed by the State Board.

The plaintiff introduced in evidence its Exhibits "V", "V-1" and "Y" (R. 75, 76, 84 to 99), the former containing a detailed statement of the characteristics of the physical property throughout the system and the latter being a transcript of the evidence submitted by the plaintiff at the hearing before the State Board of Equalization and containing the information presented in Exhibits "V" and "V-1". These exhibits were introduced not only to show the vast inferiority of the Wyoming property with reference to quantity, quality and cost as compared with the property throughout the other states, which is given in the testimony of Mr. Lorch to which reference will be made, but to show that all the information presented at the trial was presented to the State Board at the hearing. All this information was furnished each year during the five year period ending in 1931 to the State Board of Equalization.

The evidence to which we have called the Court's attention—and none of it was controverted by the defendants' witnesses—demonstrates conclusively that whatever test

of value may be applied, whether the extent and value of the use of the property, however the same may be figured, or by the comparison of the amount of property located within the state of Wyoming with that located in all the states—the value of the average mile of property in Wyoming does not exceed approximately 50% of the value of the average system mile and that the valuation of $7,881,003.94 as fixed by the State Board is approximately two million dollars in excess of the actual value of the Wyoming property.

We invite the Court's attention now briefly to the testimony of Mr. J. A. Lorch, with reference to plaintiff's Exhibit "S" relating to the I. C. C. appraisal of 1917 and the adjustments to December 31, 1930, appearing in plaintiff's Exhibits "S" and "T-1" and to the schedules appearing in plaintiff's Exhibit "U" to "U-9" both inclusive, (R. 87-99) showing the quantity, quality and physical characteristics of plaintiff's operating property located in each of the several states, including Wyoming. These schedules were prepared by Mr. Lorch, plaintiff's valuation engineer, who co-operated with the I. C. C. in a detailed examination of all plaintiff's property, which examination resulted in the appraisal mentioned, and who is familiar from personal examination with every part of the property of the plaintiff in all the states. Even a casual examination of the exhibits mentioned discloses the fact that while in such states as Illinois, Wisconsin, etc., the company has miles upon miles of multiple tracks, grade separations, very expensive terminal depots and freight terminals, repair shops, docks, block system, heavy rails, expensive grades, etc., there are in Wyoming no block system, no double tracks, no grade separations, no expensive passenger or freight depots, no elevated tracks, no expensive bridges, and that its rails by comparison are very

light and the construction of its single track very inferior, all due to the fact that the Wyoming property is at the end of the line and traverses a very sparsely settled country.

All this testimony cannot fail to show, as the trial court found the fact to be, that the use by the State Board of the percentage of miles-of-road factor without taking any account whatever of the vast difference between the Wyoming mile and the average mile in the quantity, quality, cost, characteristics or value of the property was a wholly arbitrary and unlawful method, having no essential relation whatever to the value of the property affected.

We have gone into some detail in this because of petitioners' repeated assertions that this case is at most merely one of a mistake in valuation or one of mere erroneous assessment. The conduct of the Board was more than this. It was a deliberate, intentional disregard of uncontroverted facts, showing that a mile of plaintiff's road in Wyoming is wholly different from an average mile of its system. It was that complete disregard of uncontroverted facts, clearly before the Board, that made its use of the mileage factor an arbitrary and unreasonable action, amounting, as the Circuit Court of Appeals said, to a "fraud in law". (R. 157)

Before leaving the discussion of the evidence attention should be called to the tax returns as made to the State Board from year to year, up to the year in controversy. As explained in the testimony of Mr. Miller (R. 101-107) the returns were made upon blanks prepared and supplied to the company by the State Board. These blanks were so arranged as to call for the value of each of a great many individual items of property which could be furnished only upon the basis of the I. C. C. appraisal figures. So that, for example, defendants' Exhibit "1" (R. 102-103) shows

the grand total valuation of the company's Wyoming property to be $8,281,950.00. The petitioners insist in their briefs that this figure was represented by the company to be the actual value of its Wyoming property. Such is not the case, however. There was attached to the summary sheet of each of the returns from year to year, including the last, a memorandum, a copy of which appears in the record at pages 103-104, explaining that the figures appearing in the return were arrived at on a cost basis without reference to actual value and that the actual value of the property for the year 1931, for example, did not exceed the sum of $5,849,570.00. This identical memorandum was attached to the plaintiff's return introduced in evidence in the case of *C. & N. W. Ry. Co.* v. *Eveland,* 13 Fed. (2nd.) 442, 446, and was accepted by the court in that case as the company's representation of the value of its property, as was done by the trial court in the case at bar. There can be no question, of course, that the valuation claimed by the company in its tax return for 1931 was the last-named figure rather than the figure $8,281,950.00. Presumably the purpose to be served by the detailed forms required by the State was to determine the relative portions of the total assessment to be apportioned to each of the counties, and thus do justice as among them. Having the cost appraisal of individual items of property might be helpful in such an allocation only.

Points, Authorities and Discussion.

The petitioners contend that the findings of fact, conclusions of law and decree of the Court are contrary to the law and the evidence, that the Court was without jurisdiction, and that respondent had an adequate remedy at law.

The following is a statement of the principles of law, as we understand them, governing the case, with list of authorities and discussion of the same.

1. JURISDICTION—MULTIPLICITY OF SUITS.

The necessary diversity of citizenship and amount involved existing, the Federal Court had jurisdiction in equity because the legal remedy involved a multiplicity of actions.

High on Injunctions, 4th Ed., Sec. 12, p. 18.
Wilson, Collector, v. *Ill. S. Ry. Co.,* 263 U. S. 574.
M. & O. R. Co. v. *Schnipper,* 31 F. (2d) 587 (Dist. Ct. E. D. Ill.).
Greene v. *L. I. R. Co.,* 244 U. S. 499.
U. P. Ry. Co. v. *Board of Commissioners, Weld County,* 247 U. S. 282.
Matthews v. *Rodgers,* 284 U. S. 521, 76 L. Ed. 447.
Stratton v. *St. L. S. W. Ry. Co.,* 284 U. S. 530.
Raymond v. *Chicago Union Traction Co.,* 207 U. S. 20, 38, 40.
Hill v. *Wallace,* 259 U. S. 44
Lee v. *Bickell,* 292 U. S. 415, 78 L. Ed. 895, 898, 54 S. Ct. 727.
Carroll v. *Safford,* 3 How. 441.
Parker v. *Winnipiseogee Lake Cotton Co.,* 2 Black 545.
Oelrichs v. *Spain,* 15 Wall. 211.
Cruickshank v. *Bidwell,* 176 U. S. 73.
Detroit v. *Detroit C. S. Ry. Co.,* 184 U. S. 368.
Cleveland v. *Cleveland City Ry. Co.,* 194 U. S. 517.

All the authorities recognize that the necessity for the prevention of a multiplicity of suits is a favorite and much used ground for the exercise of equitable jurisdiction by the Federal Courts and that multiplicity of suits means more than one legal action.

High, in his work on Injunctions (Fourth Edition, Section 12, p. 18) says:

"The prevention of vexatious litigation and of a

> multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction; and it may be laid down as a general rule that whenever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction."

Wilson, County Collector, et al. v. *Illinois Southern Ry. Co.*, 263 U. S. 574, was a case in which the plaintiff railway company sued the five county collectors of that many counties in the United States District Court of the Eastern District of Illinois, seeking to enjoin the collection of taxes alleged to have been illegally assessed by overvaluing plaintiff's property and undervaluing property of other taxpayers. Plaintiff claimed that the action of the assessing bodies operated to deprive it of its property without due process of law and also to deprive it of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. The defendants rested their case on a motion to dismiss for want of equity, contending that there was an adequate remedy at law and that the Court was without jurisdiction to grant equitable relief.

The Court overruled the contention of the defendants, holding that the plaintiff had no adequate remedy at law, particularly because of the fact that the situation of the plaintiff required relief against five separate defendants in five different counties, and held that the District Court had jurisdiction to grant the injunction sought. The Court, through Mr. Justice Holmes, said (575-577):

> "This is a bill in equity to restrain the collection of taxes for the years 1917, 1918, 1919, and 1920, upon the track and rolling stock then belonging to the Illinois Southern Railway Company. It alleges that the property was erroneously and fraudulently overvalued, out of all proportion to the other taxable property in the

state, and invokes the jurisdiction of the district court on the ground that the 14th Amendment of the Constitution is infringed. It alleges further that the sums that properly could have been charged have been paid; that if the additional amounts demanded could be recovered at all after payment, it would be only by a multiplicity of suits against the taxing bodies of the several counties where the collections are made. It is argued that, in any proceeding at law in these counties, it would be impossible to secure a uniform or any adequate readjustment of the total valuation, which is made by a state board, and so that equity only can afford adequate relief. The bill prays that the defendants, who are the collectors for five counties, may be restrained from applying to their respective county courts for judgments under the summary proceedings provided by statute for the collection of taxes on real estate (Cahill Ill. Stat. 1923, chap. 120, Sec. 191), and that the court will determine the amounts, if any, remaining equitably due and unpaid. The defendants ultimately relied upon a motion to dismiss for want of equity. The district court granted an injunction as prayed, and the case is here on the single question whether the plaintiffs had an adequate remedy at law. * * *

"The appellants rely mainly upon *Keokuk & H. Bridge Co.* v. *Salm*, 258 U. S. 122, 66 L. Ed. 496, 42 Sup. Ct. Rep. 207. In that case a bill charging fraudulent overvaluation was dismissed, and the dismissal was affirmed by this court on two grounds: that there was an adequate remedy at law and that the plaintiff had not tendered or offered to pay the amount confessedly due. The latter ground is absent here. As to the former, it seems to us that the present case is to be distinguished. *Keokuk & H. Bridge Co.* v. *Salm* arose upon an assessment of real estate by county assessors in a single county, as to which the remedies available were pointed out. Here the assessment was of property in five counties, by the state board of equalization for 1917 and 1918, and by its successor, the state tax commission, for the two later years. Assuming that in each of the counties before the tax could be collected a judgment must be obtained in the county court in a civil suit, and that in such suits the defendants, the

present plaintiffs, could set up the facts here relied upon, as in the Keokuk & H. Bridge Co.'s case, not only would those suits be many, but there would be insuperable difficulty in determining what the proper assessment against the whole road should be, and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties, with not improbably different results in each. It seems to us that the right of full defense in those suits, if it exists, is not an adequate remedy at law. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 38-40, 52 L. Ed. 78, 88, 89, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, 134, 30 L. Ed. 569, 571, 7 Sup. Ct. Rep. 430."

It will be noted that under Section 89-4203, Wyoming Revised Statutes 1931, not only would the plaintiff of necessity be put to four law actions, that is, one against each of the four County Treasurers, to recover back excessive taxes paid, but it would probably be put to the necessity of prosecuting as many actions at law as there are municipalities and school districts in the four counties, because the statute provides that if the taxes paid to the County Treasurer have been by him disbursed to the municipalities within the county, the actions to recover the taxes must then be brought against the municipalities.

The case of *M. & O. R. Co.* v. *Schnipper*, 31 Fed. (2d) 587 (Dist. Ct. E. D. Ill.), was one in which the plaintiff railway company sought to enjoin several defendant county collectors from the collection of taxes alleged to be excessive because of the overvaluation of plaintiff's property and the undervaluation of other property. The Court (593) held that the plaintiff pursued the proper remedy and that the Court had jurisdiction to grant injunctive relief, citing *Wilson* v. *Illinois Southern Ry. Co.*, 263 U. S. 574, 44 S. Ct. 203, 68 L. Ed. 456; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713; *Sioux City Bridge Co.* v. *Dakota County, Nebraska*, 260 U.

S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; *Greene* v. *L. & I. R. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Munn* v. *Des Moines National Bank*, 18 F. (2nd) 269 (C. C. A. 8); *Raymond* v. *Chicago Union Traction Co.*, (297) 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; *Cummings* v. *National Bank*, 101 U. S. 153, 25 L. Ed. 903.

The case of *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, presents a situation, so far as the questions of jurisdiction and the propriety of injunctive relief are concerned, almost identical with the case at bar. The plaintiff sought an injunction to restrain the levying of alleged excessive taxes growing out of a discriminatory undervaluation of the property of other taxpayers.

The bill of complaint alleged that the State Board of Valuation and Assessment unless restrained would certify to the county clerks of three counties the alleged excessive amounts claimed to be due said counties by reason of the alleged excessive valuation fixed by the Board; that the county clerks would thereupon certify said assessments to the tax collectors of the counties; that the tax collectors would proceed to make collections and institute unwarranted suits against the plaintiff; that the attorney general would institute civil and penal actions against the plaintiff based upon its supposed delinquency in the payment of taxes; and that the unauthorized and illegal valuation constitutes a cloud on plaintiff's title and a lien upon its property which unless restrained the officers would proceed to enforce by foreclosure.

The Court held that the facts stated entitled the plaintiff to injunctive relief and that there was no adequate legal remedy.

It will be noted by reference to paragraph 15 of plaintiff's bill of complaint (R. 6) in the case at bar that the al-

legations contained in plaintiff's bill are substantially and almost exactly the same as those contained in the bill in the reported case; and it will be noted by reference to paragraph 15 of the defendants' answer (R. 21, 22) that all the allegations contained in plaintiff's paragraph 15, except those as to the excessiveness of the values and taxes, are admitted.

The case of *Hill* v. *Wallace,* 259 U. S. 44, attacked the validity of the Future Trading Act of August 24, 1921, C. 86, 42 Stat. 187, by a suit for injunction in which it was contended that the issuance of an injunction would be in violation of Section 3224, Rev. Stat., 26 U. S. C. A. 154. The Court held, however, that where there were exceptional circumstances, such as multiplicity of suits, the statute referred to does not forbid the issuance of an injunction. On this point the Court said (62):

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax, in violation of Sec. 3224, Rev. Stat. Sec. 5947, 3 Fed. Stat. Anno. 2d. ed. p. 1032, in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers, under the decisions in *Ex parte Young,* 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Ohio Tax Cases,* 232 U. S. 576, 587, 58 L. Ed. 737, 743, 34 Sup. Ct. Rep. 372; *McFarland* v. *American Sugar Ref. Co.* 241 U. S. 79, 82, 60 L. Ed. 899, 902, 36 Sup. Ct. Rep. 498. Does Sec. 3224, Rev. Stat., prevent the application of similar principles to a Federal taxing act? It has been held by this court, in *Dodge* v. *Brady,* 240 U. S. 122, 126, 60 L. Ed. 560, 562, 36 Sup. Ct. Rep. 277, that Sec. 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge* v. *Osborn,* 240 U. S. 118, 122, 60 L. Ed. 557, 560, 36 Sup. Ct. Rep. 275. In the case before us, a sale of grain for future delivery

> without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back, would necessitate a multiplicity of suits, and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the act, would stop its 1,600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make Sec. 3224 inapplicable."

In the case of *Lee* v. *Bickell,* 292 U. S. 415, 78 L. Ed. 895, 54 S. Ct. 727, decided within the past year, in which it appeared that the plaintiff sued in the Federal Court for an injunction, without which he would have been put to a multiplicity of actions at law, the Court said (421):

> "Upon these facts the District Court held that the complainants, who were non-residents of Florida, were without an adequate remedy at law, and that the threatened acts of the Comptroller, if illegal, should be restrained by a court of equity. As to this we are not in doubt, the multiplicity of actions necessary for redress at law being sufficient, without reference to other considerations, to uphold the remedy by injunction. *Wilson* v. *Illinois Southern R. Co.* 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203; *Hill* v. *Wallace,* 259 U. S. 44, 62, 66 L. Ed. 822, 827, 42 S. Ct. 453. The taxes claimed by the Comptroller and resisted by the complainants exceed the amount necessary to sustain the federal jurisdiction. Several hundred transactions are affected every day."

The authorities to which particular reference has been made are quite sufficient without further citations to show that the avoidance of a multiplicity of suits is one of the exceptional circumstances warranting the exercise of equity jurisdiction; and the pleadings and evidence in the case at bar make it clear that the remedy at law available to re-

spondent would have required the bringing of at least four law actions, one against each of the County Treasurers, and as many more as there were municipalities within the several counties to which the taxes that might have been paid by the railroad company had been distributed at the time the law actions were instituted.

There is nothing in *Matthews* v. *Rodgers*, 284 U. S. 521, or *Stratton* v. *St. L.-S. W. Ry. Co.*, 284 U. S. 530, which is inconsistent with the contentions we are urging. The privilege tax complained of in *Matthews* v. *Rodgers* was one applicable separately to a number of different individuals. Each individual had one case differing from each other individual's case, in that the alleged unconstitutionality of the statute depended upon the application of the statute to each of the plaintiffs and its effect upon his business, which was alleged to be interstate commerce. Thus, there were separate issues of law and fact as to each plaintiff, the nature of his business, and the manner and extent to which the tax imposed a burden on interstate commerce. In that way there were presented separate issues of fact and law. In the controversy at bar the situation is different. There is an identity of issues, both of fact and law, which can be determined in one equitable proceeding. At least four divergent actions at law would be required, with possible divergence of conclusions. There was no multiplicity of suits present in the true sense in the situation before the court in *Matthews* v. *Rodgers*, while the case at bar is a typical instance of avoidance of multiplicity of suits, as that term has long been known to equity jurisprudence. The *Stratton case*, unlike that at bar, did not involve multiplicity of suits at all.

2. Inadequacy of Legal Remedy.

The legal remedy, to oust equity of jurisdiction, must be as complete, practicable, certain, efficient and adequate to the administration of justice as the remedy in equity.

Boyce v. *Grundy,* 3 Pet. 210, 215, 217.
Lewis v. *Cocks,* 23 Wall. 466.
Sullivan v. *Portland, etc., R. Co.,* 94 U. S. 806.
Walla Walla v. *Walla Walla Water Co.,* 172 U. S. 1.
Boise Art. H. & C. Water Co. v. *City of Boise,* 213 U. S. 276.
U. P. Ry. Co. v. *Board of County Commissioners of Weld County,* 247 U. S. 282.
Dawson v. *Kentucky Dist. & Whse. Co.,* 255 U. S. 288.
Springfield Milling Co. v. *Barnard & Leas Mfg. Co.,* 81 Fed. 261, 265, 26 C. C. A. 389-393.
Brown v. *Arnold,* 131 Fed. 723, 67 C. C. A. 125.
Kilbourn v. *Sunderland,* 130 U. S. 514.
Gormley v. *Clark,* 134 U. S. 338.
McConihay v. *Wright,* 121 U. S. 206.
A. T. & S. F. Ry. Co. v. *Sullivan,* 173 Fed. 456, 470.
Williams v. *Neely,* 134 Fed. 1, 10, 67 C. C. A. 171, 180.
Davis v. *Wakelee,* 156 U. S. 680.

It is, of course, the universally accepted rule that the legal remedy sufficient to deprive a suitor of the right to come into equity must be adequate.

In *Boyce's Executors* v. *Grundy,* 3 Peters 210, 215, 217, the general doctrine is thus stated by this Court, at p. 215:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

In *Lewis* v. *Cocks,* 23 Wall. 466, it is said (470):

> "To bar equitable relief, the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not 'as practical and efficient to the ends of justice and its prompt administration,' the aid of equity may be invoked * * *."

The language of this Court in *Sullivan* v. *Portland and Kennebec R. R. Co.,* 94 U. S. 806, is as follows (811):

> "The objection that there is a remedy at law is only available where such remedy is as plain, adequate and effectual as the remedy in equity."

In *Boise Artesian Hot & Cold Water Co.* v. *Boise City,* 213 U. S. 276, this Court said (281):

> "* * * it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford."

In *Union Pacific Railway Co.* v. *Weld County,* 247 U. S. 282, the plaintiff sought to enjoin the collection of taxes claimed to be illegal, upon the ground that resort to equity was necessary to avoid a multiplicity of actions at law. The statute of the State of Colorado, as originally enacted, authorized the taxpayer to pay under protest taxes claimed to be illegal and to file a law action against the county to recover the same. There was an amendment to the statute which left in doubt the question as to whether plaintiff could recover from the county all the taxes which he was entitled to recover, or, on the other hand, it would be necessary to maintain a separate action against each of the municipalities to which distribution might have been made by the County Treasurer. The Court held that the effect of the law being uncertain, the aggrieved taxpayer could not be required to speculate upon his remedy, and said (285):

> "Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for

then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See *Raymond* v. *Chicago Union Traction Co.* 207 U. S. 20, 39, 40, 52 L. Ed. 88, 89, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for, as this court has said: 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' *Davis* v. *Wakelee,* 156 U. S. 680, 688, 39 L. Ed. 578, 584, 15 Sup. Ct. Rep. 555."

And again (287):

"In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined.

"* * * Such questions are rarely, if ever, regarded as properly subject to examination here on writ of certiorari."

In *A. T. & S. F. Ry. Co.* v. *Sullivan,* 173 Fed. 456, the question as to whether there was an adequate remedy at law and as to the jurisdiction of the Federal Court to grant an injunction against the collection of taxes claimed to have been illegal because based upon discriminatory valuation was raised by the defendant. The suit was brought in the U. S. District Court against several county treasurers in Colorado. The Court held that even though the plaintiff might pay the taxes alleged to have been illegal and sue the several defendant county treasurers to recover the money, that was not an adequate remedy, and held further that the remedy at law in order to preclude complainant from suing

in equity must be "as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity." On this point the Court said (470):

> "Counsel cite the statute of Colorado, which provides that the board of county commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal (Laws of Colo. 1902 (Ex. Sess.) p. 146, c. 3, Sec. 202), and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Williams* v. *Neely*, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; *Boyce* v. *Grundy*, 3 Pet. 210, 215, 217, 7 L. Ed. 655; *Springfield Milling Co.* v. *Barnard & Leas Mfg. Co.*, 81 Fed. 261, 265, 26 C. C. A. 389, 393; *Brown* v. *Arnold*, 131 Fed. 723, 67 C. C. A. 125. The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity."

3. Remedy Must Be in Federal Court.

The law remedy to defeat Federal equity jurisdiction must be available in the Federal Court.

Smyth v. *Ames,* 169 U. S. 466, 516.
Henrietta Mills v. *Rutherford,* 281 U. S. 121.
Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.
C. B. & Q. R. Co. v. *Osborne,* 265 U. S. 14.
Dawson v. *Ky. Distilleries & Whse. Co.,* 255 U. S. 288.
C. & N. W. Ry. Co. v. *Bauman,* 69 F. (2nd) 171, 176 (certiorari denied, *Bauman* v. *C. & N. W. Ry.,* ..... U. S. ....., 54 S. Ct. 641).

The rule is of universal application that a remedy at law sufficient to oust equity Federal Courts of jurisdiction must be a remedy in the Federal Courts.

In *Smyth* v. *Ames, supra,* it was contended that a state statute authorizing the institution of a suit in the state court to determine the reasonableness of rates fixed by the state commission constituted an adequate remedy and that the complainant could not resort to the Federal Court without testing his rights under the state statute in the courts of the state. Holding that the remedy under the state statute was not adequate, the Court said (466, 516):

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * *
>
> * * * * *

> A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis* v. *Gray*, 83 U. S. 16 Wall. 203, 221; *Cowley* v. *Northern Pacific Railroad Co.* 159 U. S. 569, 583."

Dealing with the rule under discussion, Mr. Justice Stone, speaking for the Court, in *Risty* v. *Chicago, Rock Island & Pacific Ry. Co.*, 270 U. S. 378, said (388):

> "As the principal ground for appellees' suits was the invalidity of the whole proceeding and not merely inequality in apportionment of benefits, and as the effect of the proposed equalization would have been to bring the lands of appellees into the newly established drainage district and subject them to future assessments for construction costs and for maintenance, the threatened injury was imminent and the suits were not premature. The assessment, if made, would have established a lien on the appellees' property which would be a cloud on title, to say nothing of the fact that the effect of the pending proceeding would have been to subject their property to future assessments; hence, the case was one for equitable relief unless there was a plain and adequate remedy at law. • • • The remedy by appeal to the state court under Sec. 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the Federal courts, and the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, B. & Q. R. Co.* v. *Osborne, supra.*"

The Circuit Court of Appeals, Eighth Circuit, in the case of *Chicago & North Western Railway Co.* v. *Bauman*, 69 Fed. (2d) 171, decided February 13th of the present year, holding that a statute authorizing the recovery in a state court of illegal taxes paid under protest does not constitute an adequate remedy, uses the following language (176):

> "The adequacy of a remedy at law is not conclu-

sively determined by the statutes of a state, nor by permission to sue at law in a state court on the same cause of action. One entitled to sue in a Federal court is entitled to invoke its jurisdiction."

This Court denied certiorari April 9, 1934. *Bauman* v. *C. & N. W. Ry. Co.*, ... U. S. ....., 54 S. Ct. 641.

The rule under consideration is recognized in all the Federal Courts and requires no further discussion.

4. Remedy Under Wyoming Revised Statutes, 115-311 and 89-4201-4203, Inadequate.

Neither the remedy provided by Wyoming Revised Statutes 115-311 authorizing the county board to refund illegal taxes paid nor the remedy provided by Wyoming Revised Statutes 89-4201-4203 is adequate, because (a) each of such remedies necessarily involves a multiplicity of suits and (b) there is no statutory provision for the payment of interest on taxes authorized to be refunded.

Wyoming Revised Statutes, 115-311.
Wyoming Revised Statutes, 89-4201-4203.
Wyoming Revised Statutes, 30-1103.
Wyoming Revised Statutes, 30-1113.
Wyoming Revised Statutes, 115-308.
Wyoming Revised Statutes, 115-1005-1006.
Hopkins v. *Southern California Tel. Co.* 275 U. S. 393.
Raymond v. *Chicago Union Traction Co.* 207 U. S. 20.
Smith v. *Reeves,* 178 U. S. 436.
Proctor & Gamble Dist. Co. v. *Sherman,* 2 Fed. (2nd) 165, 166.
Nutt v. *Ellerbe,* 56 Fed. (2nd) 1058, 1062.

(a) *Each such remedy involves multiplicity of suits.*

It is contended by petitioners that the statutes mentioned afford complainant an adequate remedy.

Section 115-311 of the Wyoming Revised Statutes provides as follows:

> "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer * * *".

Section 89-4201 of the Wyoming Revised Statutes provides that

> "District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof,"

with the limitation that the action must be brought within one year after the collection.

Section 89-4202 of the Wyoming Revised Statutes provides:

> "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action."

The provision of Section 89-4203 of the Wyoming Revised Statutes is as follows:

> "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments."

Under the system provided by the Wyoming statutes for the collection and distribution of taxes, the County Treasurer is made the tax collecting officer for not only the county but the municipalities and state. The language of Section 30-1103 of the Wyoming Revised Statutes is as follows:

> "The county treasurer of each county shall be, by virtue of his office, collector of taxes therein * * *."

Section 30-1113 of the Wyoming Revised Statutes provides that—

> "Every county treasurer shall pay over to the state treasurer all state taxes and other monies received by him from the county collector on account of the state * * *."

Section 115-308 of the Wyoming Revised Statutes provides that—

> "* * * The treasurer of each county * * * on or before the 10th day of January of each year * * * shall make a full and complete settlement with the state treasurer for the state's proportion of all taxes collected before January 1st, and on or before the 25th day of July the said treasurer shall make a full and complete settlement with the state treasurer for the remainder of the tax levy of the preceding year. * * *."

The remainder of the section provides for penalties in the event of the failure of the treasurer to comply with the statutory requirements.

The provisions of Section 115-1005 and Section 115-1006 of the Wyoming Revised Statutes are as follows:

> "The amount of tax collected by the county treasurer shall be held by him like other taxes on account of the tax levied for municipal purposes for such city or town within his county and shall be paid by him directly to the treasurer of the proper city or town and he shall take his receipt therefor, deducting therefrom, however, a sum equal to one-half of one per cent. of the amount of the tax collected, which percentage shall be turned into the county treasury to reimburse the county for any extra expense for stationery or clerical

services to which the county may be put by reason of assessing and collecting the taxes for such municipality.

"It shall be the duty of the county treasurer of each county to keep an accurate record of all funds in his hands and due to the respective cities, towns, school districts, irrigation districts and drainage districts and county libraries all funds theretofore collected by him for the benefit of the respective city, town, school district, irrigation district, drainage district or county libraries."

Section 115-311 of the Wyoming Statutes affords no remedy whatever. It simply imposes a duty upon the Board of County Commissioners to direct the refunding of illegal taxes already paid. The board may, either for reasons deemed by it to be sufficient, or arbitrarily and without any reason, refuse to comply with the duty imposed. In that event the aggrieved taxpayer would be obliged to resort to the courts and of necessity would have to sue in each of the four counties, because each county would separately owe the amount erroneously paid to it, and manifestly, there could be no joint judgment.

It will be observed also that under the provisions of Wyoming Revised Statutes 89-4201-03 the taxpayer who has paid taxes not legally due would have to sue each of the four county treasurers and in addition would have to sue each of the municipalities—cities, towns, school districts, etc.—to which distribution of taxes had been made; and not only this, but he would not be able under any circumstances to recover such portion of the illegal tax as had already been distributed by the county treasurer to the state.

(b) *Failure of Wyoming statutes to provide for payment of interest.*

Sections 89-4201-03 of Wyoming Revised Statutes make no provision for the payment of interest on the money ille-

gally held by the county or the municipalities within the county. Under these circumstances it cannot be successfully contended that the remedy at law, even aside from the element of multiplicity of suits, is as adequate, complete, certain and efficient for the prompt administration of justice as the remedy in equity.

In *Hopkins* v. *Southern Calif. Tel. Co.* 275 U. S. 393, the Court held that equity had jurisdiction not alone upon the ground of the avoidance of multiplicity of suits, but because the statute authorizing the recovery of illegal taxes paid did not authorize the recovery of interest, and said (399):

> "In no permitted proceeding of law could interest upon payments be recovered for the time necessary to obtain judgments. The county and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible."

The same question was under consideration in *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, in which the court held that, in view of the multiplicity of actions involved in the exercise of the statutory right to recover illegal taxes paid, and that the proportion of the tax paid to the state could not under any circumstances be recovered, the statute afforded no adequate remedy and the aggrieved taxpayer had the right to bring an equity suit in the Federal Court.

In *Proctor & Gamble Distributing Co.* v. *Sherman,* 2 Fed. (2d) 165, it was held that a statute authorizing the recovery of taxes illegally paid, but making no provision for interest does not afford an adequate remedy. The Court said (166):

> "But, quite independently of such doubts, the relief is quite inadequate because of the express refusal to allow interest. * * * While I have been referred

to no decision on the point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and if I get no compensation for its loss, my remedy does not altogether right my wrong."

In the recent case of *Nutt* v. *Ellerbe,* 56 Fed. (2d) 1058, in dealing with the question of interest the court said:

"But there is another reason why the remedy provided by Sections 511 and 512 of the Code of 1922 is inadequate. Those sections provide merely for the recovery of the amount of the tax, and no interest. Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means of compensation for the use of money lent or wrongfully detained. A remedy which does not provide for a reasonable amount of interest is not a complete or adequate remedy. *Southern Ry. Co.* v. *Query* (D. C.) 21 F. (2d) 333, 342. *Monarch Mills* v. *S. C. Tax Comm.* 149 S. C. 219, 146 S. E. 870.

"It has been repeatedly held that the remedy at law must be plain and where there is doubt about it the taxpayer is not required to speculate and take the chance of being able to recover at law. *Davis* v. *Wakelee,* 156 U. S. 680, 115 S. Ct. 555, 39 L. Ed. 578; *Union Pac. R. Co.* v. *Board of Commissioners of Weld County,* 247 U. S. 282, 38 S. Ct. 510, 62 L. Ed. 1110; *Atl. Coast Line R. Co.* v. *Doughton,* 262 U. S. 413, 426, 43 S. Ct. 620, 67 L. Ed. 1051, and cases cited therein."

We are aware that there is a conflict of authority on the

question whether, in the absence of a statute authorizing interest, a taxpayer recovering a tax erroneously paid is also entitled to interest. The conflicting lines of authorities are collected and referred to in A. L. R. Annotations to *Schlesinger* v. *State of Wis.*, 218 N. W. 440, 57 A. L. R. 352, and *Philadelphia & Reading Coal & Iron Co.* v. *School District,* 156 Atl. 75 (Pa.), 76 A. L. R. 1007. The construction of a state statute is the concern of the State Supreme Court. We have been unable to find any Wyoming decisions as to whether or not interest would be recoverable under these statutes. It would remain a matter of doubt whether interest would be recoverable until the State Supreme Court had spoken. Whatever it said would be decisive of the question. Not only the state courts but the federal courts as well would give to the state statute the construction which the State Supreme Court put upon it. In the absence of a State Supreme Court decision, a federal court to which the question would be presented would decide it, we assume. But how? Affirmatively, as in *Erskine* v. *Van Arsdale,* 15 Wall. 75, 21 L. Ed. 63, or negatively, as in *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393? And if, during the pendency of the suit but before final judgment, the State Supreme Court came out with a decision denying the right to interest, the federal courts would follow that decision in dealing with the same statute, whatever its own thoughts might be as to the construction it would have placed on the statute. So the remedy by suit to recover the illegal tax would remain doubtful as to interest, whether in state or federal court, right to the moment of collection of a final judgment, because up to that time a State Supreme Court decision, now absent, might settle the question. Independently of all other considerations, therefore, the inadequacy of the remedy by suit for refund is clearly shown.

5. Wyoming Revised Statutes, Section 115-512, Not Adequate Remedy.

Although the taxpayer is ordinarily and by the rule of comity required to exhaust his administrative remedy, when the controversy reaches the justiciable stage he has the right to choose his own forum and may resort to the Federal courts without regard to state statutory provisions, and need not resort to appeal under Section 115-512 of Wyoming Revised Statutes, whether or not the functions attempted to be vested in the state court by that statute are judicial, because if such functions are administrative or legislative in character, the statute is invalid under the Wyoming Constitution.

Sec. 1, Art. II, Wyoming State Constitution.
Sec. 1, 10, Art. V, Wyoming State Constitution.
Wyoming Revised Statutes, 115-512.
Wyoming Revised Statutes, 91-306, 310.
Wyoming Revised Statutes, 89-302.
Wyoming Revised Statutes, 115-1809.
Midwest Hotel Co. v. *State Board of Equalization,* 39 Wyo. 461, 273 Pac. 696.
Bucknum v. *Johnson,* 21 Wyo. 26, 127 Pac. 904.
Railroad & Warehouse Commission of Minnesota v. *Duluth Street Ry. Co.,* 273 U. S. 625.
Duluth v. *Railroad & Warehouse Commission,* 209 N. W. 10.
3 Storey's Commentaries on the Constitution, p. 626.
Ex Parte Evans, 72 S. C. 547, 52 S. E. 420.
Elliott on Appellate Procedure, Sec. 15.
City of Aurora v. *Schoberlin,* 230 Ill. 496, 82 N. E. 860.
Mackin v. *Taylor County Court,* 38 W. Va. 338, 18 S. E. 632.

State v. *Burdick,* 3 Wyo. 587, 28 Pac. 146.
The Farm Inv. Co. v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258.
State ex rel. Wycoff v. *Ross,* 31 Wyo. 500, 228 Pac. 636.
Bacon v. *Rutland R. R. Co.,* 232 U. S. 134, 137.
Prentis v. *Atlantic Coast Line Co.,* 211 U. S. 210.
Detroit & Mackinac Ry. Co. v. *Michigan R. R. Commission,* 235 U. S. 402.
Prendergast v. *N. Y. Telephone Co.,* 262 U. S. 43.
C. & N. W. Ry. Co. v. *Bauman,* 69 F. (2d) 171. Certiorari denied. *Bauman* v. *C. & N. W.* ..... U. S. .....
City Bank Farmers Trust Co. v. *Schrader,* 291 U. S. 24.
Goldsmith v. *Standard Chemical Company,* 23 F. (2d) 313.

Section 1 of Article II of the state constitution, to which reference has already been made, separates the legislative, executive and judicial departments of the state government, and provides that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as the provisions of the constitution may expressly direct or permit.

The judicial powers of the state are vested in certain named courts by Section 1 of Article V, the language of which is as follows:

> "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration and such courts as the legislature may, by general law, establish for incorporated cities or incorporated towns."

By Section 10 of the same Article, district courts are given jurisdiction

> "of all causes at law and in equity, * * * of such special cases and proceedings as are not otherwise provided for * * * (and) shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. * * *"

The section also provides that district courts

> "shall have such appellate jurisdiction in cases arising in justices and other inferior courts in their respective counties as may be prescribed by law. * * *"

It will be observed that under these constitutional provisions the courts cannot exercise any functions other than judicial; that the entire judicial power is vested in certain named courts, including the district courts; and that the appellate jurisdiction of the district courts is limited to "cases" arising in inferior courts.

Section 115-512 of the Wyoming Revised Statutes provides that any party aggrieved by a valuation fixed by the State Board of Equalization may take an appeal to the District Court, "where a trial *de novo* to the court shall be had." The party appealing shall, within sixty days after the decision of the Board, file in the District Court a "petition setting out the cause of complaint" and a certified copy of the records of the Board; and shall at the time of filing the appeal furnish a bond to the State of Wyoming to be approved by the clerk of the District Court, the amount of which is to be fixed by the District Judge, conditioned that the appeal will be prosecuted without unnecessary delay and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property. The clerk is required to notify the secretary of the Board and supply him with a copy of the petition. The Attorney General and the County Attorney are required to represent the Board in the proceedings on appeal. And all pro-

ceedings on appeal, except as otherwise provided in the appeal statute, are to be governed by the provisions of the Code of Civil Procedure, "as in other civil cases."

The petitioners contend that the plaintiff had an adequate remedy under this statute by appeal from the valuation fixed by the State Board to the district court; and, presumably to avoid the effect of the rule that the complaining party may, as soon as the administrative steps are exhausted, choose his own judicial forum, they insist in their supplemental brief that the state district court on appeal exercises administrative or legislative functions rather than judicial functions.

Our position is that whether the functions of the state court on appeal from the State Board of Equalization are judicial on the one hand, or legislative or administrative on the other hand, the complaining taxpayer is not, in either event, required to resort to such appeal before proceeding in the Federal court. If the state court acts in a judicial capacity it necessarily follows that the legislative or administrative remedy was complete with the final action of the State Board in making its order of July 14, 1931, and that the plaintiff had the right to choose his own forum. If the state court on appeal acts in a legislative or administrative capacity, the statute itself is necessarily unconstitutional, because under Section 1 of Article II, already quoted, the courts cannot under any circumstances exercise executive or legislative functions.

Counsel for petitioners call attention, in their supplemental brief, to the case of *Midwest Hotel Company* v. *State Board of Equalization,* 39 Wyo. 461, 273 Pac. 696, and say that the District Court in this case acted in an administrative capacity, arguing (P. 4 of supplemental brief) that "the District Court has been charged by the legislature, in addition to its judicial functions, with the duty of performing administrative functions with authority to de-

termine the valuation of respondent's property," and that the "hearing *de novo* (provided for by the statute) is an integral part of the administrative procedure adopted by the legislature as a method for levying and collecting taxes on railroad property."

There is nothing in the opinion of the case cited by counsel for petitioners indicating that the court was acting in a legislative or administrative capacity. In fact, the question of its jurisdiction with reference to the constitutional provision separating the powers of the state government was not mentioned in the opinion, and, so far as we have been able to find, has not been discussed in any decision of the Wyoming Supreme Court, and the question should, therefore, now be determined by this Court. *Risty* v. *Chicago, Rock Island & Pacific R. Co.*, 270 U. S. 378. In the *Midwest Hotel case* the Supreme Court sustained the ruling of the trial court that the District Court was without jurisdiction, and assigned as the reason for its holding that the appeal statute as it then existed made no provision for procedure governing the appeal.

Petitioners argue that the amendment adopted after this decision and now appearing as Wyoming Revised Statutes 115-512 supplies the omissions in the earlier statute as to procedure. We think that the correctness of this contention is subject to very serious doubt. It will be noted that the statute (Wyoming Revised Statutes 115-512) makes no provision for the formation of issues. It provides that the appellant "shall * * * file in the District Court * * * a petition setting out the cause of the complaint * * *," but it does not make any provision for the filing by anyone of an answer. It designates an appellant as the party claiming himself to be aggrieved by the decision of the State Board; but it makes no provision at all as to who the appellee shall be. A "case" either at law or in equity cannot exist without pleadings or without parties, one af-

firming a right under facts claimed to exist and the other denying that right. It probably will not be contended that the court can supply the parties; but if such a contention should be made, and if the court should supply the parties and direct them to be brought in, it certainly would direct the bringing in of the parties in interest, that is, the parties affected by the order that the court might make. These would, of necessity, include the state as well as the counties, because the state, as well as the counties, shares in the taxes collected by the county treasurers. But the state is immune from suit, except by its own consent.

There is nothing in the appeal statute as to the scope of the proceedings in the District Court—whether the court will take new evidence or whether it will confine itself to a consideration of the evidence submitted before the State Board. This would be an inadequate remedy, under *C. B. & Q. R. Co.* v. *Osborne,* 265 U. S. 14, in which it was held that a proceeding merely to review the action of the State Board on the record before it does not constitute an adequate remedy.

The court in the *Midwest Hotel case,* in pointing out the procedural defects in the law as it then existed, called attention to the fact that "neither the time within which the appellate proceeding is to be commenced, nor the manner of its consideration by the reviewing court, are prescribed," and then proceeded to ask a number of questions: "Shall the district court correct only errors of law alleged to be committed by the State Board of Equalization, or shall it re-try the matter in its entirety, taking evidence anew, framing new issues, and considering matters not submitted to the tribunal whose action is attacked? Shall the district court undertake to substitute its judgment on questions thus brought before it for review for that of the State Board of Equalization, or shall the court be limited to keeping the Board's action within the latter's proper

sphere, as defined by the constitution and laws enacted pursuant thereto?" And the court then adds: "Faced with these inquiries the statute before us is wholly silent."

Faced with the same inquiries, the present statute is almost completely silent. It says that the trial on appeal shall be "*de novo.*" But it does not say what "*de novo*" means; and it may as well mean a decision "*de novo*" upon the question of valuation and upon the evidence submitted to the State Board as a decision on the same question but with the submission of new evidence. The statute still leaves undetermined the question as to whether the District Court shall "correct only errors of law alleged to be committed by the State Board of Equalization," or whether it shall "re-try the matter in its entirety," whether it shall "take evidence anew," whether it shall "frame new issues," and whether it shall "consider matters not submitted to the tribunal whose action is attacked." We submit that the new matter as to procedure contained in the present statute fails utterly to supply the defects which caused the court, in the *Midwest Hotel case*, to hold that the statute was unconstitutional.

Reference is made by counsel for petitioners, at Page 4 of their supplemental brief, to Wyoming Revised Statutes 91-306, and to the case of *Bucknum* v. *Johnson*, 21 Wyo. 26, 127 Pac. 904, decided under the provisions of this section; and they say Wyoming Revised Statutes 115-512 is "identical in purpose to Section 91-306."

Section 91-306 is but one of five sections of the statute relating to the appeal and procedure upon appeal from a decision of the State Land Board to the District Court. The procedure outlined supplies all the elements omitted from the statute relating to an appeal from the State Board. It designates the parties, plaintiff and defendant (Wyoming Revised Statutes 91-306). It provides for the filing of a

notice of appeal with the secretary of the State Board and with the District Court (Wyoming Revised Statutes 91-307). It requires the clerk of the court to transmit the evidence submitted to the Board and the records of the proceedings there to the District Court (Wyoming Revised Statutes 91-308). It provides that the case in the District Court is to be heard on the pleadings filed before the Board unless the court shall order the filing of new pleadings (Wyoming Revised Statutes 91-308). It provides for the taking of evidence in the District Court and "other proceedings had as in the trial of a civil action before said court." It provides for the notice to be issued by the District Court clerk upon the filing of the bond (Wyoming Revised Statutes 91-309) and that the case shall be deemed ready for hearing upon the expiration of the time stipulated in the notice; and it provides for an appeal from the judgment of the District Court to the state Supreme Court (Wyoming Revised Statutes 91-310). None of these provisions are found in the statute relating to the appeal to the District Court from the State Board of Equalization; and it is a matter of serious doubt whether the Supreme Court of the state, if the constitutionality of the latter statute were now called to its attention, as the former statute was in the Midwest Hotel Company case, would not now hold, as it did in that case, that the statute as to procedure on appeal is so defective as to make it void.

At least, the determination of the question is so doubtful that the taxpayer ought not to be required to speculate as to what the court might hold and take his chance that the state court would assume jurisdiction. *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway Co.*, 273 U. S. 625; *Union Pacific Railway Co.* v. *Board of Commissioners, Weld County,* 247 U. S. 282.

Another reason readily suggests itself why the procedure under Wyoming Revised Statutes 115-512 is not an ade-

quate remedy. The decision of the State Board from which defendants contend plaintiff should have taken an appeal was made July 14, 1931 (R. p. 51). The Board is required, under the provisions of Wyoming Revised Statutes 115-1809, "on or before the first Monday in July, or as soon thereafter as the said Board or any two thereof shall have made and determined such valuation and assessment," to certify the same to the county assessors; and the county commissioners are required, thereupon, to divide the valuation among the school districts within the respective counties and to cause the valuations thus apportioned to be placed on the list of taxable property returned by the several assessors.

Under the provisions of the same section, fifty per cent of the annual tax falls due and becomes a lien on the property involved on the 1st of September, and becomes delinquent on the 10th of November. There is no time fixed by the appeal statute for the filing of an answer by the appellee or appellees, whoever they may be, or for the determination of the appeal. The appellant has sixty days from the date of the Board's decision within which to file its appeal, so that the appeal need not have been filed in this case until the 14th of September, and in the ordinary course of business of the District Court would probably not be determined, if at all, until some time in December. What action would the State Board and the county assessors and treasurers have taken in the meantime? In compliance with its statutory duty, the State Board would have certified the valuation as fixed by it to the county assessors long before an appeal would be taken, and with such certification the matter would be entirely out of the Board's hands. Following such certification by the Board, the property would be put on the tax rolls and the taxes levied thereon would become a lien on the taxpayer's property and a cloud on its title—and all this before the time for the institution of the

appeal had expired. And even after the institution of the appeal, there is no provision of the statute that would require any further action by either the Board or the county officers to be stayed. *C. B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14. On the contrary, the statute (Wyoming Revised Statutes 115-515) explicitly requires the county officers to levy and collect the taxes on the valuation originally fixed by the Board. So that notwithstanding the taking of an appeal, any action that the District Court, or, on further appeal (if there can be such appeal), the Supreme Court, might take would be futile so far as protecting the rights of the appellant are concerned.

Mr. Justice Holmes, speaking for the court in *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway Co.*, 273 U. S. 625, with reference to a similar situation, said (628):

> "Where, as here, a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the District Court of the United States. *Pac. Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975: *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 67 L. Ed. 659."

In the instant case, not only would it have been possible that the plaintiff, if it had followed the statutory procedure by appeal, would have been too late to get into the United States District Court, but it is certain that it would have been too late, because before it could have followed the statutory appeal through to a conclusion the taxes would have become a lien on its property and a cloud on its title thereto, and the treasurer, in performance of his statutory duty, would have proceeded to make collection.

Moreover, under most of the authorities no appeal whatever could have been taken, under any circumstances, from

the State Board of Equalization, an administrative body, to a court, because an appeal is merely a step in judicial procedure and cannot be taken from a non-judicial body to a judicial body. Particularly is this true where there is a constitutional separation of powers, and where, as in Wyoming, the appellate jurisdiction of the district courts is limited to cases arising in inferior courts. Wyoming Constitution, Article V, Sec. 10. This principle is very aptly stated by Judge Storey in his Commentaries on the Constitution (Vol. 3, p. 626), where he says:

> "The essential of appellate jurisdiction is that it reviews and corrects the proceedings in a case already instituted, and does not create that cause in reference to judicial tribunals; an appellate jurisdiction, therefore, necessarily implies that the subject matter has been instituted in and acted upon by some other court whose judgments or proceedings are to be reviewed."

In *Ex Parte Evans,* 72 South Carolina 547, 52 S. E. 420, in which the Court had before it the question as to whether an appeal would lie from an order of the city council to the Circuit Court, the Supreme Court of the State of South Carolina, after quoting Judge Storey, concludes:

> "In order, therefore, to give the Circuit Court appellate jurisdiction in the matter appealed from the city council, it must appear that the city council was, in the matter sought to be reviewed, acting in a judicial capacity, as distinguished from doing a ministerial, administrative, or discretionary act."

The same principle is recognized in Elliott on Appellate Procedure, in which the author (Sec. 15) says:

> "* * * The word ('appeal'), when accurately used in law matters, means the removal of a suit in equity, or of an action at law, from an inferior court to a superior court. * * * The matter of appeals is essentially, and throughout, judicial, and there can, in legal contemplation, be no appeal where there is no decision by a judicial tribunal. Two things are essential, the decision of a judicial tribunal of original jurisdic-

tion, and a superior court invested with authority to review the decision of the inferior tribunal."

In *City of Aurora* v. *Schoberlin,* 230 Ill. 496, 82 N. E. 860, where the court had under consideration the constitutionality of the statute authorizing an appeal to the state court under constitutional provisions identical with Section 1 of Article II, and Section 1 of Article V, of the Wyoming Constitution, relating to the distribution of powers of government and the vesting of the judicial powers in the courts, the Supreme Court of Illinois quoted with approval the language of Mr. Elliott in his work on appellate procedure and held the Illinois statute to be unconstitutional.

In *Mackin* v. *Taylor County Court,* 38 W. Va. 338, 18 S. E. 632, it was held that a statutory appeal could not be taken to a court from the county court, because the latter was a non-judicial body performing the functions of a Board of County Commissioners.

While, as already suggested, it makes no difference, so far as the determination of the case at bar is concerned, whether the functions of the state court on appeal from the State Board of Equalization are judicial, on the one hand, or administrative or legislative, on the other hand, it seems to us that the conclusion must be reached that the functions of that court are, in fact, judicial rather than administrative or legislative. The appeal statute, itself, provides that all proceedings on appeal, except as in the statute provided, shall be under the provisions of the Code of Civil Procedure, "as in other civil cases." Civil cases are, of necessity, judicial in their character and the language of the statute strongly indicates the legislative intent to make the functions of the court on appeal judicial in character.

Moreover, statutes will always be so construed as to make them constitutional if possible, and the only construction that can be put upon the statute under discussion that

would sustain its constitutionality is to construe the functions of the court as being judicial. As already noted, whether the functions of the District Court on appeal, under this statute, are judicial or otherwise, has never been decided by the Supreme Court of the state, although that court has frequently emphasized the necessity of maintaining the constitutional separation of the powers of the state government. *State* v. *Burdick,* 3 Wyo. 587, 28 Pac. 146; *The Farm Investment Company* v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258; *State ex rel. Wycoff* v. *Ross,* 31 Wyo. 500, 228 Pac. 636.

To understand the uncertainty of the remedy afforded by the Wyoming appeal statute, it is only necessary to put one's self in the position of an aggrieved taxpayer contemplating and endeavoring to determine whether he should proceed under the Wyoming statute relating to appeal from the State Board of Equalization or, disregarding this remedy, go direct into the Federal equity court, as did the plaintiff in this case. The questions necessary to be answered are numerous. Is the proceeding designated by the statute as an appeal a "case" at all, within the meaning of Section 10 of Article V of the constitution, dividing the appellate jurisdiction of the District Court? To constitute a case within the meaning of the constitutional provision and of statutes relating to practice and procedure, must there not be at least two parties to the litigation? The statute indicating only the appellant, who is the appellee? Is it the county or the school districts or the municipalities or the state, or any or all of these, each having an interest in the taxes collected under the assessments to be levied upon the valuation fixed by the Board? By what process are the parties defendant or appellee to be brought into court, there being no provision made for a summons? How are the issues to be joined in the case? The statute providing only for the filing by the appellant of a petition set-

ting forth his cause of complaint, is there an answer to be filed by the appellee, whoever that may be? Or, if not, can there be issues without the filing of such an answer? Will the District Court frame the issues and when will they be required to be filed, and when is the case ready for trial?

What is the scope of the authority of the District Court on appeal? Does it determine the issues *de novo* and without being bound by the order of the Board but upon the evidence presented before the Board, or does it take new evidence? What order does the District Court make? Does it simply determine whether the valuation as fixed by the State Board is reasonable or unreasonable, or does it fix its own valuation? If the latter, how does it enforce its order upon the State Board or the county assessors or county treasurers? Since no appeal is provided for by the statute under consideration from the state court to the Supreme Court, does such an appeal lie?

In view of the statutory provisions relating to the duties of the Board of Equalization to certify its valuations to the county assessor and the duties of the county assessors to proceed upon the original valuations of the Board, rather than upon any valuation that may be fixed by the court, of what effect will be any reduction that the District Court on appeal might make in the valuation fixed by the Board? In the absence of provisions halting further action on the part of the Board and the county officers, is not any order that the court might make of no force or effect whatever?

There being no decision of the Wyoming Supreme Court answering any of these questions, the taxpayer aggrieved by the valuation fixed by the State Board and undertaking to find a remedy under the appeal statute would find himself engulfed in a cloud of doubt and speculation. In *Union Pacific Railway Co.* v. *Board of Commissioners of Weld County,* 247 U. S. 282, dealing with the construction of a statute of the State of Colorado, which presented fewer dif-

ficulties than that now under consideration, the Supreme Court said that "it is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

It was held in the case of *Atlantic Coast Line Company* v. *Daughton,* 262 U. S. 413, that a remedy provided for by a state statute which has not been construed by the state court of last resort will not be considered adequate. On this point, Mr. Justice Brandeis, speaking for the court, said (425):

> "On behalf of the state it was urged that the bill was properly dismissed by the district court because there is, under the laws of North Carolina, a plain, adequate, and complete remedy at law by which a taxpayer may recover the amount of an illegal tax paid by him under protest. Our attention has been called to several North Carolina cases and statutes bearing upon this contention. But the statute mainly relied upon is a recent one, which appears not to have been construed and applied by the highest court of the state. In the absence of such decision, we cannot say the remedy at law is plain and adequate. *Dawson* v. *Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, 296, 65 L. ed. 638, 646, 41 Sup. Ct. Rep. 272; *Wallace* v. *Hines,* 253 U. S. 66, 68, 64 L. ed. 782, 785, 40 Sup. Ct. Rep. 435; *Shaffer* v. *Carter,* 252 U. S. 37, 47, 64 L. ed. 445, 454, 40 Sup. Ct. Rep. 221; *Union P. R. Co.* v. *Weld County,* 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510; *Davis* v. *Wakelee,* 156 U. S. 680, 688, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 535. We have therefore passed upon the merits."

Whatever may be the determination of the court as to the functions exercised by the state court on appeal from the State Board of Equalization, and whatever may be held as to the uncertainty of the state law and the inadequacy of its provisions with reference to procedure, the Federal courts have settled the question as to the adequacy of the

remedy by appeal under state law, and have repeatedly held that once the justiciable stage of the controversy has been reached, Federal equity jurisdiction is not to be defeated merely by a judicial remedy by appeal in a state court.

In *Risty* v. *Chicago, Rock Island & Pacific R. Co.* and consolidated cases, 270 U. S. 378, the question as to the adequacy of a state statutory remedy by appeal to the District Court from the decision of a Drainage District Board was presented for decision, the plaintiffs having sued in the Federal equity court to enjoin the county officers of Minnehaha County, South Dakota, from making any apportionment of benefits or assessments or costs affecting their property for the construction or repair of a drainage district, without resorting to an appeal to the state court under the state statute.

The court held that the necessary jurisdictional facts appearing, the plaintiffs were not required to resort to their remedy by appeal under the statute of the state, because that remedy was afforded only in the state court and that a law remedy sufficient to oust equity of jurisdiction must be a remedy in the Federal court. On this point the court said (388):

> "The remedy by appeal to the state court under Section 8469 does not appear to be co-extensive with the relief which equity can give. In any event, it is not one which may be availed of at law in the Federal courts, and the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state court. *Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819; *C. B. & Q. R. R. Co.* v. *Osborne*, 264 U. S. 14."

The court said further, dealing with the question of uncertainty of the remedy under the state law (389):

> "The legal remedy under the state law being uncertain, the Federal court has jurisdiction in equity to enjoin the assessment. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288."

In *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134, there was a bill in equity filed by the plaintiff in the Federal court to restrain the Public Service Commission of the State of Vermont from enforcing an order concerning a passenger station at Vergennes, which order was claimed by the plaintiff to violate its right under the Fourteenth Amendment. There was a motion by the defendant to dismiss upon the ground that the plaintiff had an adequate remedy at law by appeal under a state statute from the order of the Commission to the Supreme Court of the state. The motion was overruled and an injunction issued as prayed.

Distinguishing the case from that of *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, upon the ground that the right of appeal in the Prentis case was given by the constitution itself, by which also the court was given legislative powers, Mr. Justice Holmes, speaking for the Court, held that the Court on appeal under the Vermont statute exercised purely judicial functions; that, the Court not having legislative powers, and the justiciable stage of the controversy having been reached, the plaintiff was entitled to resort to the Federal equity court without exercising his right of appeal under the state statute; and that the injunction was properly issued by the trial court.

There is an interesting discussion of judicial and non-judicial powers, and of the earlier cases of *Prentis* v. *Atlantic Coast Line Company* and *Bacon* v. *Rutland R. R. Company*, in the case of *Detroit & Mackinac Railway Co.* v. *Michigan Railroad Commission*, 235 U. S. 402. In the State of Michigan there was a statute authorizing any party dissatisfied with the order of the State Railroad Commission to institute a suit in the state Circuit Court in Chancery to set aside the order, from which court there was provided an appeal to the Supreme Court, in both of which there was a decision unfavorable to the Railroad Com-

pany. That company then instituted a bill in equity in the Federal court, where the writ was denied upon the ground that the state court, under a constitutional provision of the State of Michigan strikingly similar to Article II of the Wyoming Constitution separating the executive, legislative and judicial departments, and under the Michigan appeal statute, acted in a judicial capacity and that therefore the final determination of the controversy in the Michigan Supreme Court was *res judicata*. There was a strong suggestion by Mr. Justice Holmes that if the Michigan statute had been so construed as to give to the state court on appeal legislative powers, the statute would have been unconstitutional.

In *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, the court had for consideration the question as to whether the plaintiff, before resorting to a Federal equity court for an injunction, should have exhausted his state statutory remedy by certiorari. The court held that the controversy was ripe for judicial proceedings with the order of the Commission and that since the procedure by review was judicial in its character, the plaintiff was entitled to choose his own forum and resort to the Federal equity court without pursuing his judicial remedy in the state court. On this point Mr. Justice Sanford, speaking for this Court, said (48):

> "Upon the making by the commission of the orders in question the proceedings had reached the judicial state entitling the company to resort to the court for relief. *Bacon* v. *Rutland R. Co.*, 232 U. S. 134, 137, 58 L. Ed. 538, 539, 34 Sup. Ct. Rep. 283, distinguishing *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229, 53 L. Ed. 150, 160, 29 Sup. Ct. Rep. 67, in which an appeal had not been taken to the highest tribunal vested with the final legislative authority of the state. Here the commission is vested with the final legislative authority of the state in the rate-making process; the authority exercised by the state courts upon a re-

view by certiorari (*People ex rel. Central Park, N. & E. River R. Co.* v. *Willcox,* 194 N. Y. 383, 87 N. E. 517), being purely judicial and having no legislative character (Laws New York 1920, chap. 925, Sec. 1304, 1305, pp. 437, 438)."

In *C. & N. W. Railway Co.* v. *Bauman,* 69 Fed. (2d) 171, the question presented was as to whether it was incumbent upon the complaining taxpayer in a suit like that at bar to resort to the statutory remedy by appeal before suing for an injunction in the Federal Court, it being contended by the defendant county treasurers that the administrative remedy was not exhausted until the disposition of the case on appeal to the state court, and that until such disposition the right of the complaining taxpayer to choose his own forum did not arise.

The Circuit Court of Appeals of the Eighth Circuit, speaking through Circuit Judge Van Valkenburgh, said that while the Board of Equalization, in which the appeal was authorized to be taken, acted in an administrative capacity, the state court on appeal acted judicially, that the administrative remedy was exhausted with the action of the State Board, and that therefore the aggrieved taxpayer had the right to sue in the Federal equity court without resorting to the appeal under the state statute.

The court said (176):

"The adequacy of a remedy at law is not conclusively determined by the statutes of a state, nor permission to sue at law in the state court on the same cause of action. One entitled to sue in a Federal court is entitled to invoke its jurisdiction. * * * The test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. * * * Especially where such remedy at law, if available, would entail a multiplicity of suits, or where the legal remedy under the state law is uncertain."

This Court denied certiorari in this case April 9, 1934. *Bauman* v. *C. & N. W. Ry.*, ... U. S. .....

In *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway Co.*, 273 U. S. 625, the commission was authorized by statute to fix public utility rates and the statute provided for an appeal from the decision of the commission to the state District Court (627) "there the whole matter," in the language of the court, "fact and law, is to be tried before three judges without a jury. They are to find all material facts, including the fair value of the property and the reasonable rate of return, and to affirm, modify or reverse the order of the commission as may be required by law, the commission being directed to conform to their judgment in its final order. There is a further resort to the Supreme Court."

The bill in equity in that case was filed by the Street Railway Company to enjoin enforcement of an order fixing the fare to be fixed at six cents, upon the ground that the rate fixed was confiscatory.

It was claimed by the commission that the plaintiff was bound to exhaust the statutory appeal before resorting to the courts.

Calling attention to the fact that the Supreme Court of the State of Minnesota, in *Duluth* v. *Railroad & Warehouse Commission,* 209 N. W. 10, had held the appeal under the Minnesota statute to be judicial in character, the court held that the plaintiff was within his rights in resorting to the Federal court for an injunction without taking the statutory appeal. The court further said:

> "* * * It must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where, as here, a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly

> reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the District Court of the United States. *Pacific T. & T. Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. ed. 975; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 67 L. ed. 659."

If as a result of *Matthews* v. *Rodgers,* 284 U. S. 521, or otherwise, there ever was any doubt as to the right of the plaintiff here to resort to federal equity jurisdiction, notwithstanding Section 115-512 of the Wyoming Revised Statutes, that doubt seems completely removed by the decision of this court in the late case of *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, decided January 8, 1934. In that case the District Court for the Eastern District of Pennsylvania had dismissed a suit to enjoin the collection of a Pennsylvania inheritance tax. It was the position of the defendants in that case that under *Matthews* v. *Rodgers* plaintiff was required to proceed under a Pennsylvania statute which provided for an appeal to the Court of Common Pleas of that state from the appraisement made by the administrative body, which was the state department of revenue. On appeal from the decree of the District Court of the United States for the Eastern District of Pennsylvania, this court reversed and held that federal jurisdiction existed, pointing out that under the state statute the appeal must be entered in a state court specifically designated by the statute, and thus was not an ordinary proceeding. This court also pointed out that in that case the Commonwealth had conditioned the right to implead it, upon resort to a forum of its choice. So this court said that as the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, its existence cannot oust federal equity jurisdiction. The Wyoming statute upon which petitioners place reliance in the instant

case presents precisely the situation that the Pennsylvania statute did in *City Bank Co.* v. *Schnader,* and does not bar the present proceeding for exactly the same reason that the bill in that case was held by this Court to be properly brought.

It is clear from the authorities cited that the remedy provided by Wyoming Revised Statutes 115-512 does not preclude the aggrieved taxpayer from resorting to the Federal equity court without pursuing the remedy by appeal, for the following reasons:

1. The statute itself is so indefinite and incomplete, particularly with reference to its provisions relating to procedure, as to be entirely lacking in the element of certainty, adequacy and efficiency requisite to oust equity of jurisdiction, and as to leave the taxpayer to speculate upon the possibility of his securing under the appeal statute the relief to which he is entitled.

2. The remedy afforded by appeal under the statute does not meet the requirement that to oust a Federal equity court of jurisdiction there must be an adequate legal remedy in the Federal court.

3. If the state court on appeal, under the statute, exercises administrative functions, the statute itself is unconstitutional because under the Wyoming Constitution administrative powers cannot be vested in the state courts.

4. If the functions vested in the state court on appeal are judicial, as it seems to us they clearly are, the administrative remedy having been exhausted by the proceeding before the State Board, culminating in its order fixing the valuation of plaintiff's Wyoming property, plaintiff had the right to choose its own forum and to resort to the Federal courts without pursuing its judicial remedy in the state courts.

5. It is extremely doubtful whether, particularly in view of the Wyoming Constitutional provisions and the incompleteness of the provisions of the appeal statute relating to procedure, that the statute, in the absence of a decision of the Wyoming Supreme Court, affords any remedy whatever. The remedy, if any there be, being doubtful, the plaintiff cannot be required to resort to it before going into the Federal equity court, which alone can afford certain, adequate and efficient relief.

6. Cloud on Title.

Equity has jurisdiction to enjoin the collection of illegal taxes in order to prevent a cloud on taxpayer's property.

Union Pac. Ry. Co. v. *Ryan, Marshal of City of Cheyenne,* 113 U. S. 516.

Risty v. *C. R. I. & P. Ry. Co.* 270 U. S. 378.

Ohio River & Western Ry. Co. v. *Ditty,* 232 U. S. 576, 587.

Ogden City v. *Armstrong,* 168 U. S. 234.

Shaffer v. *Carter,* 252 U. S. 37.

Wallace v. *Hines,* 253 U. S. 66.

It is alleged in plaintiff's Bill of Complaint (R. 6) that the taxes alleged to be illegal constitute a lien upon plaintiff's property and a cloud upon its title to the same and that unless restrained the defendant County Treasurers will destrain and sell the property of the plaintiff located within the counties. These allegations are admitted in the answer (R. 22).

In the case of *Union Pacific* v. *Ryan, Marshall, City of Cheyenne,* 113 U. S. 516, it was held that the cloud upon the title to taxpayer's property arising out of the assessment of illegal taxes is in itself sufficient to give equity jurisdiction. The Court, speaking through Mr. Justice Bradley

and holding that there must be some equitable ground for relief besides the mere illegality of the tax, said (525):

> "It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

The other cases listed are to the same effect.

7. Sufficiency of Pleading.

The Bill of Complaint sufficiently alleges the indequacy of a legal remedy.

Equity Rule 25.

DeWitt v. *Hayes*, 2 Cal. 463, 56 A. D. 352, 354.

Dennis v. *M. & M. Ry. Co.*, 137 Ala. 649, 97 A. S. R. 69.

Town of Flagstaff v. *Gomez*, 242 Pac. 1003 (Ariz. 1916).

Martin v. *Baltimore & Ohio R. Co.*, 151 U. S. 673.

Appellant's counsel contended in the court below, and, we assume, will contend here that there is no allegation of necessity of equitable relief to avoid a multiplicity of suits. It is true that there is no formal allegation in the Bill of Complaint that plaintiff resorts to equity in order to avoid a multiplicity of actions at law. Such a formal explicit allegation is entirely unnecessary and, in fact, unavailing, unless accompanied by allegations of fact from which the Court may draw the inference that but for injunctive relief the plaintiff would be put to a multi-

plicity of suits, the rule being that facts and not conclusions or opinions must be pleaded, and that a mere allegation of the lack of a legal remedy, or the necessity of resorting to equity to avoid a multiplicity of suits, is a conclusion.

Equity Rule 25 is to the effect that "it shall be sufficient that a bill in equity shall contain * * a short and simple statement of the ultimate facts upon which the plaintiff seeks relief * * *"; and in conformity with this rule it is generally held by the courts that if facts are pleaded which show to the Court that the plaintiff is without an adequate legal remedy, whether the lack of legal remedy arises from threatened irreparable injury, the necessity of avoiding a multiplicity of suits, or any other proper circumstances, he states a cause of action warranting the issuance of an injunction, although no specific reference whatever is made in his Bill to "irreparable injury" or "multiplicity of suits". In other words, it is for the Court to determine upon the facts pleaded, considered, of course, in the light of statutory and adjudicated law, whether the plaintiff has, or has not, an adequate legal remedy.

Cases in which the question of the necessity of formal allegations as to multiplicity of suits, inadequacy of legal remedies, etc., are discussed are few; and we know of only one (*Town of Flagstaff* v. *Gomez,* 242 Pac. 1003 (Ariz.)) in which it was even contended that such formal allegations are necessary where facts are pleaded from which the conclusion follows. There are a number of cases in the books, however, in which it has been held that formal allegations, without allegations of facts from which the Court may draw the necessary conclusions, are insufficient.

In the case of *DeWitt* v. *Hayes,* 2 Cal. 463, 56 A. D. 352, 354, the Court said:

"In the present case, under the allegation of irrep-

> arable injury, the plaintiffs seek to avail themselves of a writ of injunction which has been styled the 'right arm of the law'. The simple allegation of irreparable injury is not sufficient; it should appear to the court from the facts set forth in the bill."

The distinction between pleading facts showing to the Court the necessity of equitable intervention, and alleging as mere conclusions that the plaintiff is threatened with irreparable injury, that he has no adequate legal remedy, or that he seeks to avoid multiplicity of suits, is clearly brought out by the Court in *Dennis* v. *M. & M. Ry. Co.*, 137 Ala. 649, A. S. R. 69, in which the Court says:

> "The averment of a mere conclusion as to such inadequacy, or as to the irreparable character of the injury, without the averment of facts to support the conclusion, is insufficient. (Citing authority.)"

In the case of *Town of Flagstaff* v. *Gomez*, 242 Pac. 1003 (Ariz. 1916), it was held that there is no necessity for a formal specific allegation of the lack of adequate remedy at law where the absence of such legal remedy appears from the facts alleged in the petition. The Court said:

> "It is claimed, however, that a writ of mandamus does not lie for the reason there is no formal allegation that there is no plain, speedy and adequate remedy at law. We think it is elementary that if a pleading sets up facts from which ultimate conclusions may be clearly drawn, the ultimate conclusions themselves need not be alleged."

The authorities clearly indicate the rule to be that allegations to the effect that the plaintiff has no adequate remedy at law, that he is threatened with irreparable injury, and that he seeks to avoid multiplicity of suits, are mere statements of conclusions of the pleader; that they are entirely unnecessary; but that the Bill must state facts warranting the conclusion to be drawn by the Court that in reality the plaintiff has no adequate legal remedy.

With the general rule in mind, we proceed to examine the factual allegations.

The Bill in this case alleges that a valuation was put upon plaintiff's property in Wyoming by the State Board of Equalization (R. 3); that the valuation was grossly excessive and constituted an arbitrary discrimination against the plaintiff (R. 3, 4, 5); that the total valuation on plaintiff's property in Wyoming was, by the State Board, apportioned to each of the several counties (R. 6); that the valuation so apportioned to each of the four counties was excessive (R. 6, 7); that the excessive valuation was certified to the four county assessors (R. 6); that each of the four county assessors levied taxes upon the value certified to him by the State Board, and placed the tax so levied upon the assessment roll and certified the same to the four County Treasurers for collection (R. 6); that the four County Treasurers threaten to and unless restrained will levy distraint upon plaintiff's property and sell the same for the tax so levied on an excessive and discriminatory valuation (R. 6); and that the illegal taxes levied constitute a lien upon plaintiff's property and a cloud upon the title to the same (R. 6). In addition, it is alleged that plaintiff has no plain, adequate and speedy remedy at law (R. 6, 7).

The allegations of fact above recited are all admitted by the defendants, although, of course, they do not admit the allegations of excessiveness of the tax nor the discrimination charged.

These allegations must be considered in the light of the Wyoming statutes under which the suits for refund would be brought. The United States District Court in Wyoming to which the bill was presented takes judicial notice of the statutes of that state, and therefore this court on review does likewise. *Martin* v. *B. & O. Ry. Co.*, 151 U. S. 673.

Section 89-4203 of the Wyoming Revised Statutes states that "Actions to recover back taxes and assessments must be brought against the officer who made the collection, or if he is dead, against his personal representative; * * * provided that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments." According to the bill in this case, the state taxing machinery had reached the point where each of four county treasurers was about to enforce collection of the amount claimed by his county on the discriminatory valuation. The amounts were different in the four various counties. Had payment been made in all four counties, what would have been defendants' remedy? Obviously, a suit against each county treasurer for the excess collected by him, as no one of the other three county treasurers would be liable for the excess collected by the treasurer of the first county. There could be no joint judgment against four county treasurers each of whom owed a different amount. The obligation is not a joint and several one but is a several obligation in each county, disconnected from any of the others. This is perfectly clear from the statute, and the statute is as much before the court as the factual allegations of the bill. What was required of the plaintiff was that these allegations show that such facts existed as would have brought into play the actions against the various county treasurers of which the statute speaks. This has been done. Taking the bill in one hand and the statute in the other (and this is exactly what the United States District Court in Wyoming did—R. 33), no other conclusion can be reached than that the statutory remedy by suit to recover the amounts paid meant a separate suit against each county treasurer making a

wrongful collection. Thus the injunctive remedy by stopping the excessive collection makes unnecessary the bringing of four suits to recover excess payments. The pleading thus shows facts from which the conclusion necessarily follows that the equitable remedy was necessary to avoid multiplicity of suits. Hence the bill is adequate.

8. Railroad Valued as a Unit.

The value of a railroad is in its use as a whole and its property should be valued for tax purposes as a unit.

Union Pac. Ry. Co. v. *Ryan, Marshall, City of Cheyenne,* 113 U. S. 516.
Fargo v. *Hart,* 193 U. S. 490.
Wallace v. *Hines,* 253 U. S. 66.

It is manifest that no part or section of an operating railroad has substantial value in itself and that the value of every part arises out of its connection as an integral part of the entire system. It is for this reason that the courts hold that a railroad system should be valued for tax purposes as a unit and that the value of any part of the system within a taxing unit should be fixed with reference to the system value.

In *Union Pacific Ry.* v. *Ryan, Marshall,* 113 U. S. 516, the Court said (522):

> "The difficulty of assessing the value of railroad property in separate parcels, located in distinct cities and townships, is almost insuperable. A railroad cannot be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation."

9. Value of Carrier Property Is Measured by Value of Use.

The value of property for tax purposes is measured by the extent and value of its use.

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 421.

C. C. C. & St. L. v. *Backus,* 154 U. S. 439.

M. & O. R. Co. v. *Schnipper,* 31 F. (2d) 587 (Dist. Ct. E. D. Ill.).

In *Pittsburgh C. C. & St. Louis Ry. Co.* v. *Backus, supra,* the plaintiff railroad company sued to enjoin the collection of illegal taxes by the treasurer of several counties in the State of Indiana. Among other questions presented to the Court was the question of the basis of value, particularly applied as to interstate carriers. On that point the Court said (430):

> "* * * when the statute provides that such property shall be assessed at its 'true cash value' it means to require that it shall be assessed at the value it has, as used, and by reason of its use."

The same rule is laid down by the Supreme Court in *C. C. C. & St. Louis Ry. Co.* v. *Backus, supra,* which was a suit to enjoin the collection of illegal taxes, in which the Court said (445):

> "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

The rule thus clearly stated by the Supreme Court is followed by the District Court for the Eastern Division of Illinois in the case of *M. & O. R. Co.* v. *Schnipper*, 31 Fed. (2d) 587.

10. Method of Fixing Railroad System Value.

The most accurate method of determining the railroad's operating system value is by the use of the average market value of its stocks and bonds and by capitalization of its net income and deducting therefrom the value of its non-operating property locally assessed.

Wyoming Constitution Art. 15, Sec. 10, 11. W. R. S. 115-1804.

Taylor v. *Secor*, 92 U. S. 575.

Chicago & N. W. Ry. Co. v. *Eveland*, 13 F. (2d) 442, 443 (C. C. A. 8).

Temmer v. *Denver Tramway Co.* 18 Fed. (2d) 226, 229 (C. C. A. 8).

M. & O. Ry. Co. v. *Schnipper*, 31 F. (2d) 587 (D. C. E. D. Ill.).

C. C. C. & St. L. Ry. Co. v. *Backus*, 154 U. S. 439.

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus*, 154 U. S. 421.

The Wyoming Constitution, Art. 15, Sections 10 and 11, provides that railroad property shall be assessed by the State Board of Equalization at its actual value and that all property except as otherwise provided by the constitution shall be uniformly assessed. The constitutional provision is as follows:

"Sec. 10. The duties of the State Board shall be as follows: * * * To assess at their actual value the franchises, roadway, roadbed, rails and rolling stock and all other property used in the operation of all railroads and other common carriers, except machine shops, rolling mills and hotels in this state; such as-

sessed valuation shall be apportioned to the counties in which said roads and common carriers are located as a basis for taxation of such property; provided that the assessment so made shall not apply to incorporated towns and cities. Said Board shall also have power to equalize the valuation on all property in the several counties for the state revenue and such other duties as may be prescribed by law."

"SEC. 11. All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

The plaintiff, as shown by the evidence, arrived at the value of its operating property by taking the average five-year market value of its stocks and bonds (less the value of its non-operating property), and the average five-year value as shown by capitalizing its net income at six per cent. annually, and by adding the sum of the two values thus obtained and dividing by two, obtained the reported figure of $375,285,902.00 which figure reflects the average of the actual market value and the value of the use as measured by income.

The authorities are agreed that the method used by the company and by the State Board as above outlined in fixing the value of the company's operating property is a proper method for arriving at such value.

While it is the property that is the basis of the tax, the value of the property is fixed by the value and extent of its use. *C. C. C. & St. Louis Ry. Co.* v. *Backus,* 154 U. S. 439; *M. & O. R. Co.* v. *Schnipper,* 31 Fed. (2d) 587.

In the case of *Taylor* v. *Secor,* 92 U. S. 575, decided in 1875, the plaintiff sought to enjoin the defendant tax collector from collecting taxes claimed to have been levied upon an excess valuation. The first question disposed of by the Court in its opinion was as to the use of the market

value of stocks and bonds as determining the system value of the plaintiff's property.

On this point the Court said (605):

> "It is therefore obvious, that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In *C. & N. W. Ry. Co.* v. *Eveland,* 13 Fed. (2d) 442, a case almost identical with the case at bar and determining most of the questions here presented, the Court, dealing with the question now under consideration, says (443):

> "* * * In determining the value of the property of a railway company for the purposes of taxation, several classes of evidence are admissible; but the net earnings of the property and the market value of its stocks and bonds for a reasonable period antecedent to the making of the assessment constitute the most reliable and influential evidence of that value."

While this Court granted certiorari in the *Eveland case* (*Eveland* v. *C. & N. W. Ry. Co.,* 273 U. S. 680) after which the case was settled and dismissed pursuant to stipulation (273 U. S. 775), the quoted part of the opinion seems clearly in accord with the decisions generally.

The same question was presented in the case of *Temmer* v. *Denver Tramway Co.,* 18 Fed. (2d) 226, in which the *Eveland case* was cited with approval. Dealing with this question, the Court said (228):

> "The specific elements which enter into the actual value of a great railroad property as a going concern are: (1) 'The value of the use of such property in the operation of its railroads and its net revenue from such use, and (2) the current market value of its stocks and bonds.' *Chicago etc. Ry. Co.* v. *Eveland* (C. C. A.) 13 Fed. (2d.) 442."

In *Mobile & O. R. Co.* v. *Schnipper,* 31 F. (2d) 587, in which the plaintiff sought to restrain the collection of alleged excessive taxes, the Court held that the use of market value of stocks and bonds is a correct method of arriving at the system value, quoting the language of the Supreme Court, in *Taylor* v. *Secor,* 92 U. S. 575, and held further that non-carrier property should be deducted from the system market value. (This was done, of course, in the case at bar.) On this point the Court said (591):

> "In this connection we should notice that tax-exempt property and non-carrier property should be deducted from the market value of securities."

11. Miles-of-Road Improper Factor Arbitrarily Used.

The use of the miles-of-road factor in determining the value of the portion of a railroad system located within a particular jurisdiction, when the cost and amount of property per mile of road within the jurisdiction is substantially less than throughout the system, is a fundamentally wrong and arbitrary method of determining value, and when it results in substantially increasing the value of the property within the jurisdiction above its actual value, amounts to taxing within the jurisdiction property of the carrier located outside and to the taking of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution and to an illegal discrimination in violation of Article 15, Section 11 of the Wyoming Constitution. It is a fraud in law, when so used in plain disregard of known facts.

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 421.

Fargo v. *Hart, Auditor,* 193 U. S. 490.

Union Tank Line Co. v. *Wright,* 249 U. S. 275.

Wallace v. *Hines, Director,* 253 U. S. 66.

Southern Ry. Co. v. *Ky.,* 274 U. S. 76.

There can be no question, in view of the evidence, that the Board, in arriving at the value of the Wyoming property actually used as one of four factors 3.29 representing the proportion of the company's main track mileage located within the state of Wyoming. The testimony of Mr. McWhinnie to which we have referred in discussing the evidence and the trial court's findings of fact are conclusive on this point.

In passing, attention should be called to the fact that the use of the track mileage factor is a glaringly arbitrary method of arriving at the value of plaintiff's Wyoming property because of the provisions of Article 15, Section 10 of the Wyoming Constitution already quoted, restricting the jurisdiction of the State Board of Equalization to railroad property outside the limits of incorporated cities and towns. The evidence shows without dispute that there are several incorporated cities and towns along the line of of the plaintiff's railroad in Wyoming, including Casper, Riverton, Shoshoni, Hudson, Lander, Glenrock, Douglas and Lusk. All the property in the incorporated cities and towns, including the main line track, is locally assessed by the county assessors, and should, of course, be taken out of the figure 278.35 representing the total main line track mileage within the state because that figure includes the main track located within, as well as without, the incorporated cities and towns.

Upon the main point now under consideration we invite the Court's attention to the case of *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421, in which this Court discussed at some length the question when and under what circumstances it is proper to use a mileage factor of allocation. That case holds that where the carrier's property consists of "a single continuous line" of about the same value throughout, the miles-of-road factor is proper to be used. It also holds that quite the contrary is true where, as in

the case at bar, there is a vast difference in the character, cost and value of the property within and without the particular state. The uncontradicted testimony in this case showing these vast differences, is fully discussed at pages 12 to 20 of this brief under sub-head "Evidence" in this argument.

In *Fargo* v. *Hart, Auditor,* 193 U. S. 490, plaintiff Fargo, as president of American Express Company, filed suit to enjoin defendant State Auditor from collecting taxes alleged to have been erroneously assessed. Plaintiff's property was assessed on the basis of the value of its stocks and bonds and was allocated to the state (Indiana) on a mileage basis. Plaintiff contended that in levying the assessment on the basis of the value of miles of road, the defendant had taken into consideration, and levied assessment upon, great quantities of property of the plaintiff located outside the State of Indiana and had thus taken property without due process of law. This is the main question presented in the case.

The Court held that the defendant had in effect taxed property of the plaintiff outside the State of Indiana and had thus attempted to take plaintiff's property without due process of law and the judgment of the lower court was reversed. The Court said (449, 502):

> "The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared

wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. *Western U. Tel. Co.* v. *Taggart,* 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

"It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense. *Pittsburgh C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 431; *Western Union Tel* v. *Taggart,* 163 U. S. 1, 23; The same principle applies to personal property which the state would not have the right to tax directly, *Adams Exp. Co.* v. *Ohio State Auditor,* 165 U. S. 194, 227; S. C., 166 U. S. 185, 222, 223. In *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus,* there was reason to suspect an infraction of constitutional rights, but the secretary of state testified that there was no assessment of property outside the state, 154 U. S. 434, and therefore the court could not say that there was more than a possible overvaluation by the board. Of course, if the board did not go beyond its jurisdiction, its decision was final. But the court recognized that if the facts charged had appeared, the case would have been

different. In the Express Company's cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise, a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account.

* * * * *

"The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the state, and to throw an unconstitutional burden on commerce among the states."

Union Tank Line Co. v. *Wright, Comptroller General of Georgia*, 249 U. S. 275, is another case in which plaintiff sued to enjoin the levy of taxes on its tank cars in the State of Georgia on a valuation of $291,196.00 claiming the value of its cars to be only $47,310. The Georgia statute provided as follows: (280)

"SEC. 989. Each non-resident person or company whose sleeping cars are run in this state shall be taxed as follows: Ascertain the whole number of miles of railroad over which such sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax rate imposed upon the property of this state in the same proportion to the entire value of such sleeping cars that the length of lines in this state over which such cars are run bears to the length of lines of all railroads over which such sleeping cars are run. * * *"

In accordance with this statute, the defendant comptroller fixed the valuation of plaintiff's property on a basis of the per cent of miles of track over which plaintiff's cars were operated in Georgia of the whole number of miles of track over which plaintiff operated its cars throughout the country.

Plaintiff alleged and proved that the average number of cars operated by it within the state was 57; that the value of each was $830, and the total value of the 57 cars was $47,310.

The Court held that the method provided by the statute and followed by the comptroller was arbitrary because of the fact that the number of miles of track over which the plaintiff operated its cars had no relation to the value of the average number of cars operated since it might operate a few cars over a long line of road in Georgia, while at the same time operating a great number of cars over a short line of road in other states. The Court said (281-283):

> "The scheme of the statute is what is sometimes called the track-mileage basis of apportionment. * * *.
>
> * * * * * *
>
> "A state may not tax property belonging to a foreign corporation which has never come within its borders,—to do so under any formula would violate the due process clause of the 14th Amendment. * * * but if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment or both. (Citing cases).
>
> "In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310,—the challenged assessment specified $291,196.
>
> "We think plaintiff in error's property was ap-

> praised according to an arbitrary method which produced results wholly unreasonable, and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

In this case, as in previous cases, the Court points out that use of the mile-of-road factor within and without the taxing jurisdiction when the values are not substantially the same and without taking this factor into consideration is an arbitrary method of arriving at value, warranting the granting of injunctive relief.

In *Wallace* v. *Hines, Director,* 253 U. S. 66, plaintiff sued defendants to enjoin the levy and collection of taxes against the Northern Pacific Railroad, based upon the percentage of main line track located in North Dakota of the entire main line track of the system. The North Dakota statute (68) provided:

> "that in the case of a railroad * * * having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state."

The statute also provided that the value of the entire system should be figured on the value of its stocks and bonds.

The railroad company contended that by fixing the value of its property in the State of North Dakota on a basis of the proportion of its miles of track to the miles of track in the entire system, the defendants violated the Fourteenth Amendment to the Federal Constitution, prohibiting the taking of property without due process of law, because of the fact that the physical value of the mile of track in North Dakota is much less than that of the average amount of track throughout the system.

This Court sustained the railroad company's contention, holding the North Dakota statute already quoted to be unconstitutional.

This Court said that according to the allegations of the Bill, North Dakota is a state of plains, very different from other states, and that the cost of the roads in that state was much less than in other states, that most of its distributing centers and valuable terminals are in other states, and said (69):

> "So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. * * *
>
> "The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the possession of bonds secured by mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—whatever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state. *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 364. In this case it is alleged that the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart,* 193 U. S. 490; *Union Tank Line Co.* v. *Wright,* 249 U. S. 279, 282.

The principles of law established and recognized in the cases reviewed seem to be quite clear. The use of the mile-of-road factor is proper in some cases and improper in others, depending entirely upon the facts of the particular case. If it affirmatively appears in the evidence that the general characteristics are substantially the same within the taxing jurisdiction and throughout the system so that the company's property measured by a mile of road is actually worth about the same throughout the system, the use of the mile-of-road factor is proper because it fairly determines the percentage of the system value located within the taxing jurisdiction.

If it clearly appears from the evidence, on the other hand, that the property of the complaining taxpayer within the taxing jurisdiction is of a substantially lower character, cost and value than its property without the taxing jurisdiction, and if the facts showing the difference are known to the taxing authority the use of the mile-of-road factor, without taking into account this difference, constitutes the exercise by the taxing authority of arbitrary power and amounts to the taking of property without due process of law contrary to the Fourteenth Amendment to the Constitution, and constitutes an unlawful burden upon interstate commerce.

The application of the principles enunciated in the cases to the case at bar is clear. The evidence shows beyond question that, however measured—whether by the use of factors which the Courts have held to be the proper criterion of value, or by percentages of costs based upon the cost figures of the Interstate Commerce Commission adjusted to December 30, 1930, with proper allowances for depreciation as testified to by Mr. McWhinnie—a mile of road in Wyoming is worth approximately, and probably less than, one-half the value of the average system mile. The evidence in this respect is collected and summarized in this

brief under "Argument" sub-head "Evidence" at pages 12 to 20 inclusive. The testimony of Mr. Balch establishes this fact from a statistical standpoint (R. 51-70, 126-139), while the testimony of Mr. Lorch and the exhibits introduced by him establish the fact upon consideration of the principal items of physical property constituting the operating system of the company within the State of Wyoming and throughout the system. (R. 84-98).

12. Findings of Fact Conclusive on Arbitrary Action of Board.

Findings of fact concurred in by two lower courts will not be disturbed by the Supreme Court of the United States unless shown to be clearly erroneous.

Bodkin v. *Edwards,* 255 U. S. 221.
Charles H. Baker v. *John W. Schofield,* 243 U. S. 114.
Causey v. *U. S.,* 240 U. S. 399.
Gilson v. *U. S.,* 234 U. S. 380.
American Bank & Tr. Co. v. *Fed. Reserve Bank,* 262 U. S. 643.
Brewer Elliott Oil & Gas Co. v. *U. S.,* 260 U. S. 77.
Waterman Co. v. *Modern Pen Co.,* 235 U. S. 88.

The rule on this point is stated very clearly in *Bodkin* v. *Edwards, supra,* in which the Court said (223):

> "The case, as presented here, turns essentially on questions of fact. Both courts below, on a review of the evidence, have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. *Page* v. *Rogers,* 211 U. S. 575, 577; *Washington Securities Co.* v. *U. S.,* 234 U. S. 76, 78; *Wright-Blodgett Co.* v. *U. S.,* 236 U. S. 397, 402; *National Bank* v. *Shackelford,* 239 U. S. 81."

The trial court (R. 44-45), as has already been mentioned, found that the quantity, quality, cost and value of plaintiff's

property within the state of Wyoming measured upon the miles-of-road basis were greatly less than throughout its system and that these facts were well-known to the State Board when it made its valuation; and also that the Board "used as a factor the percentage of plaintiff's main line track located in the state of Wyoming, to-wit, 3.29% without taking into account" the difference mentioned. The opinion of the trial judge accompanying the findings stresses the fact that the use of this factor by the Board with the true facts before it amounted to an arbitrary and unreasonable method. (R. 41) The Court of Appeals concurred in the findings of the trial court and called the Board's action "a fraud in law." (R. 157) Under the well established rule of the Supreme Court these findings will not be disturbed because not only are they not shown by the evidence to be clearly erroneous but on the contrary they are clearly shown to be supported by the evidence.

In this connection we wish to point out that what the trial court said (R. 42) to the effect that "reasonable and honest effort was made to fairly and honestly tax property and to secure the return of all property for taxation which is legally taxable" *pertained only to the allegations of intentional undervaluation and omission of other property. It did not relate at all to the separate findings and other part of the opinion in respect of the arbitrary overvaluation of plaintiff's property.* Petitioners' statement in their brief accompanying their petition for certiorari (pp. 15, 16) that a finding of intentional, arbitrary overvaluation of plaintiff's property is inconsistent with the quoted statement is erroneous. The exoneration which the court granted the Board on the charge of intentional undervaluation and omissions of other property did not extend to the other and separate offense of arbitrary overvaluation of plaintiff's property. Otherwise the court would not have termed the overvaluation "arbitrary" (R. 43) or an "arbitrary

and unreasonable method and the application of a wholly wrong method and principle" (R. 46) nor would the Circuit Court of Appeals have called it a "fraud in law." (R. 157)

13. Arbitrary Over-Valuation Violates Constitutional Rights.

The arbitrary, unreasonable, and systematic over-valuation of plaintiff's property constitutes discrimination in violation of its rights to equal protection of the laws under the 14th Amendment to the Federal Constitution and Article 1, Sec. 28 of the Wyoming Constitution.

U. S. Constitution, 14th Amendment.

Wyoming Constitution, Art. 1, Sec. 28.

Wyoming Constitution, Art. 15, Sec. 11.

Sioux City Bridge Co. v. *Dakota Co.* 260 U. S. 441.

Bohler, Tax Collector v. *Callaway,* 267 U. S. 479.

Greene v. *L. & I. R. Co.,* 244 U. S. 499, 37 S. Ct. 673.

Iowa-Des Moines Nat. Bank v. *Bennett,* 284 U. S. 239.

Taylor v. *L. & N. R. Co.,* 88 Fed. 350, 364-365, 373-374 (C. C. A. 6).

A. T. & S. F. R. Co. v. *Sullivan,* 173 Fed. 456, 470.

C. & N. W. Ry. Co. v. *Eveland,* 13 F. (2d) 442, 443 (C. C. A. 8).

C. & N. W. Ry. Co. v. *Bauman,* 69 F. (2) 171, 173.

L. & N. R. Co. v. *Bosworth,* 230 Fed. 191 (Dist. Ct. Ky.).

M. & O. R. Co. v. *Schnipper,* 31 F. (2) 587, Dist. Ct. E. D. Ill.).

Bunton v. *Rock Springs Grazing Assn.* 29 Wyo. 461, 215 Pac. 244.

People v. *C. B. & Q. R. Co.,* 300 Ill. 399, 133 N. E. 325, 326-327.

Lively v. *M. K. & T. Ry. Co.,* 102 Tex. 545, 120 S. W. 852, 856, 858.

One of the grounds for injunctive relief prayed for by the Bill of Complaint is that plaintiff's property was arbitrarily, systematically and persistently, over a period of years, overvalued each year to the extent of about two million dollars; that a great proportion of the other property in the state was omitted altogether from the tax rolls and that property generally was greatly undervalued. It is alleged that the discrimination thus resulting placed upon the plaintiff an undue proportion of the tax burden of the state and constituted a violation of his rights under the equal protection of the laws provisions of the 14th Amendment to the Federal Constitution and under the uniformity provisions of the State Constitution. The discrimination resulting in the violation of the taxpayer's rights may result from the over-assessment of his own property or the under-assessment of other property. In either case there is the inequality forbidden by the 14th Amendment to the Federal Constitution and the lack of uniformity commanded by the State Constitution. The trial court, in the instant case, found that there was not sufficient evidence to sustain plaintiff's allegations as to the undervaluation and omission of property other than its own, but found that plaintiff's property was overvalued to the extent of about one and one-half million dollars by the use of a mileage factor in the face of known facts showing vast differences in the per mile value of the taxpayer's property within and without the State. This overvaluation under the authorities constitutes a deprivation of plaintiff's constitutional rights. It is more than a mere error. It is arbitrary action, or, as the Circuit Court of Appeals said, "fraud in law."

The provision of Article 1, Sec. 28 of the State Constitution is that "all taxation shall be equal and uniform", while it is provided in Article 15, Sec. 11 that "all property * * * shall be uniformly assessed for taxation * * *".

It is contended in petitioners' brief that the Court has no jurisdiction to fix the value of a taxpayer's property. What the Court might do in a case where the State Board had failed entirely to supply a basis for valuation need not be considered in this case because the State Board in its order by proper methods established the system value of plaintiff's operating property and furnished the basis for the determination of the value of plaintiff's property within the state of Wyoming by the use of two proper factors and a third which, for the purposes of this case, may be considered as proper. Its arbitrary action consisted in the use of a fourth factor which the Court determined to be unlawful. All that the trial court did was to eliminate the improper factor and to arrive at the value—at which the Board ought to have arrived—by a mere mathematical calculation. In all the cases similar to the one at bar the courts, where they have set aside excessive values improperly arrived at by the taxing body, have determined and established correct values.

This was done in the case of *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441. In that case the taxing officials of the State of Nebraska arbitrarily assessed plaintiff bridge company's property at 100% of its value, and all the other real estate in the county at 55%. Holding that this constituted an invasion of plaintiff's constitutional right to equal protection of the laws the Court said (445):

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35, 37."

Following which the Court cites a number of analogous cases.

Holding that the function of the court in such cases is to reduce the valuation to a proper amount, the Court said (446):

> "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska supreme court in this case upholds the violation of the 14th Amendment to the injury of the bridge company. We, must, therefore, reverse its judgment."

In *Iowa-Des Moines National Bank* v. *Bennett,* 248 U. S. 239, it was held that the act of a state official in taxing plaintiff's property at a higher percentage of value than that of other property is the act of the state within the meaning of the 14th Amendment, even when done in violation of state law, and constitutes an invasion of plaintiff's right to equal protection of the laws under that amendment.

In *Taylor* v. *L. & N. R. Co.,* 88 Fed. 350, under State Constitution provisions requiring uniform assessment on the basis of value, the Court said (364):

> "The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the Section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the com-

plaining taxpayer and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and it follows of the same class. This is a flagrant violation of the clause of the Constitution forbidding discrimination in taxation between different species of property."

Many of the cases dealing with the question of discrimination and lack of uniformity and the consequent denial of the property owner's rights under the equal protection provision of the Federal Constitution and the uniformity provisions of the State Constitutions deal with cases where the complaining taxpayer's property has been either assessed at its full value or over-assessed and in addition there has been an under-assessment of other property. The rule is the same where, though there is no undervaluation of other property, the complaining taxpayer's property is arbitrarily overvalued.

It is expressly so held as applied to such a state of facts in *Chicago & N. W.* v. *Eveland,* 13 Fed. (2d) 442, where the Court, dealing with the discrimination by overvaluation of plaintiff's property said (448):

"The evidence establishes the fact that the plaintiff presented to the tax commission similar objections, protests, schedules and testimony at the hearing before that commission on the assessment of the property in South Dakota of the plaintiff for 1921 and the seven previous years. The assessments for those years were as follows: 1914, $41,459,249; 1915, $41,796,850; 1916, $41,899,439; 1917, $41,945,624; 1918, $41,955,855; 1919, $41,960,113; 1920, $41,115,784; 1921, $41,956,406. This fact compels the conclusion that the overvaluation of the property of this railway company for purposes of taxation was not exceptional but has been and is systematic, persistent, established, and

that it threatens to be prolonged. Such an overvaluation, whereby the property of a complainant is made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the tax. Nor is an evil intention of the members of the board which makes such persistent overvaluation to perpetrate such an injustice indispensable to the maintenance of a suit for relief in equity in such a case as that under consideration.

"The property of a railway company used and usable in the operation of its lines in South Dakota is required by its statutes to be assessed for taxation by the state tax commission. Rev. Code of S. D. 1919, Secs. 6596-6601. The real estate and personal property of corporations other than railway companies and of individuals are required to be assessed by different assessors or boards, and Section 6700 of the Code of South Dakota of 1919, requires that 'all property shall be assessed at its true and full value in money.' The legal presumption, in the absence of evidence on that subject, and there is none in this case, is that all property other than that of railway companies was assessed at its fair, full value. Instead of having all property subject to taxation in the state valued by the same commission or board, different boards or assessors valued for taxation different classes of property pursuant to the statutes of that state.

"In *Taylor* v. *Louisville & N. R. Co.* 88 F. 350, 374, 31 C. C. A. 537, 561, a case heard and decided by Judge Taft, now Chief Justice, Judge Lurton, subsequently Mr. Justice Lurton, and Judge Severens, Judge Taft, delivering the opinion of the court, said:

'The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one

judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination.'

"By the same mark, if any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly overvaluing as in this case a certain class or classes of property, the assessment by other boards of other classes of property at their fair value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the overassessed property. And this is true, although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination.

"In *Greene* v. *Louis. & Interurban R. Co.*, 244 U. S. 499, 518, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, the Supreme Court quoted and adopted this rule and declared that 'the justice of this view has been recognized by the state courts of last resort in many cases' and cited 11 cases in support of its statement.

"Moreover, the systematic, repeated, continuing violations of the Constitution or the law, to the injury of a complainant, like a continuing trespass, constitute persuasive evidence of intention so to do, inflict upon the injured party the same damage that they would if they were intentional, and present ample ground for relief in equity. *Atchison, T. & S. F. Ry. Co.* v. *Sullivan*, 173 F. 456, 461, 97 C. C. A. 1; *Wells Fargo & Co.* v. *Johnson*, 214 F. 180, 189, 130 C. C. A. 528, L. R. A. 1916C, 522 and cases there cited; *Cummings* v. *National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903; *Raymond* v. *Chicago Traction Co.* 207 U. S. 20, 36, 37, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann Cas. 757."

The *Eveland case* is the one in which, as we have already pointed out at page 75 of our brief, this Court granted certiorari (*Eveland* v. *C. & N. W. Ry. Co.*, 273 U. S. 680), after which the case was settled and dismissed pursuant to stipulation (273 U. S. 775).

Chicago and North Western Railway Company v. *Bauman*, 69 Fed. (2d) 171, decided by the Circuit Court of

Appeals, Eighth Circuit, in February of this year, was a suit in equity by this same plaintiff to restrain the collection of taxes for 1931 (the same year here involved) in the adjoining state of Nebraska. Plaintiff's contention was that the arbitrary overvaluation of its property to the extent of about $6,000,000, preceded by systematic and persistent overvaluation over a period of years, constituted a violation of its rights under the Fourteenth Amendment to the Constitution of the United States. In both that case and this, there were allegations of more than mere miscalculation or mistake. Allegations in the *Bauman case* to the effect that the discrimination was intentional, persistent, and arbitrary were held sufficient to furnish a ground for federal equity relief as against the contention there made by the defendants that the allegations were insufficient to state a fraudulent discrimination. The Court specifically held (173) that where arbitrary overvaluation is charged it is unnecessary to plead in the alternative that other property was undervalued. The Circuit Court of Appeals reversed a decree of the District Court which had dismissed the bill for want of equity. The case was therefore remanded with directions to reinstate it upon the docket for hearing on the merits. The effect of the decision in the *Bauman case* is exactly that for which we contend here, viz., that where there is a charge (and in the case at bar, uncontradicted proof) of arbitrary action by wilful ignoring of known facts and use of a factor known to be wrong for the purpose of bringing into the state and taxing there property located in other states, it is unnecessary to allege or prove fraudulent intent on the part of the Board. This Court denied certiorari in the *Bauman case* April 9, 1934, ... U. S. .....

The testimony of Mr. Miller (R. 101) shows that the State Board for a period of five years prior to and including the year 1931, valued the plaintiff's property in Wyoming at

approximately the amount fixed by the Board in 1931, and that each of these years the plaintiff presented to the Board information showing its property to be worth approximately $2,000,000.00 less than the figure assessed by the Board, from which it appears that the overvaluation had been systematic.

The necessity of uniformity in the valuing of property for taxation purposes is clearly recognized by the Supreme Court of Wyoming in *Bunton* v. *Rock Springs Grazing Assn.*, 29 Wyoming 461. On this point the court said:

> "Section 11 of article 15 of the Constitution provides that:
>
> " 'All property, except as in this Constitution otherwise provided, shall be uniformly assessed for taxation, and the Legislature shall prescribe such regulations as shall secure a just valuation * * * of all property, real and personal.'
>
> "Under this provision, plaintiff had the right to have all the taxable property in the county, as well as in the state, assessed at a uniform rate, and a departure therefrom if made in an illegal manner is, where its property is assessed at full value, a discrimination against it which could not only be a fraud against plaintiff, but would also violate the constitutional provision of uniformity. Such discrimination may arise in various ways, for instance by the adoption of a wrong or illegal rule, principle, or method; and an unjust tax resulting therefrom has frequently been enjoined as illegal. * * * And without attempting to analyze the rule closely, it appears to be universally recognized by all the authorities that where assessors or boards of equalization are guilty of intentional and systematic discrimination, and probably intentional discrimination alone, such conduct is fraudulent and renders the excessive assessment and tax illegal, and authorizes a court of equity to interfere by injunction."

While most of the cases heretofore cited in this brief dealing with the question of discrimination by the overvaluation of complaining taxpayer's property or the undervaluation of other property use language in-

dicating that the discrimination must be intentional, it is clear from all of them that systematic and persistent discrimination over a considerable number of years sufficiently indicates the intention to discriminate, because the intent with which a thing is done being a state of mind is seldom susceptible of direct proof and must be inferred from the act or course of conduct indicating such intent.

When public officials ignore uncontradicted facts unquestionably known to them, and when those facts establish a vast difference in the character of property within and without the state, their use of a miles-of-road factor is so utterly indefensible as to constitute arbitrary action. Proof of evil intent adds nothing. Men's intent is judged by the effect of their acts. The clear effect of the act of the Board in using a mileage factor was to establish a device to bring into the state for taxation purposes property that never belonged there.

14. Value and Cost.

There is no necessary or essential relation between cost and value, and taxes can only be levied upon the value of the property subject to taxation. All property in Wyoming is required by the Wyoming Constitution and Statutes to be assessed at its actual value.

Wyoming Constitution, Art. 15, Sec. 10.

W. R. S. 1931, 30-306.

Pittsburgh, C. C. & St. L. R. Co. v. *Backus,* 154 U. S. 421.

Western Union Tel. Co. v. *Taggart,* 163 U. S. 1.

Temmer v. *Denver Tramway Co.,* 18 F. (2d) 226, 229 (C. C. A. 8).

C. S. Ry. Co. v. *Guenther,* 19 F. (2d) 395, 400.

C. & N. W. Ry. Co. v. *Eveland,* 13 F. (2d) 442, 443 (C. C. A. 8).

So. Ry. Co. v. *Kentucky,* 274 U. S. 76.

Under the Wyoming constitutional provisions already quoted all property must be assessed at its actual value.

The duty of the county assessing officer to assess at actual value is imposed by Sec. 30-306, W. R. S. 1931, which provides that

> "it shall be the duty of the county assessor or his deputies to examine such property and place as near as possible the actual cash market value in money opposite each class of property listed for taxation."

There is no necessary connection between value and cost. In the case of *Pittsburgh, C. C. & St. Louis Ry.* v. *Backus,* 154 U. S. 421, dealing with this question, the Court said (429):

> "The value of the roadway at any given time is not the original cost, nor *a fortiori,* its ultimate cost after years of expenditures in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock."

Conclusion.

The evidence clearly shows, and the trial court so found, its finding being affirmed by the Circuit Court of Appeals, that the complainant's property was systematically, arbitrarily and by the use of a wholly wrong principle and method, overvalued each year over a period of approximately five years, to the extent of more than $1,500,000.00. This finding of fact, agreed to by two

courts, should not be disturbed. As to the jurisdiction of the Federal equity court, there seems to us to be no doubt. The remedy provided by the state statute with reference to suits to recover back illegal taxes paid is not an adequate legal remedy, because it involves at least four law actions, one against each county, and probably as many more as there are municipalities and school districts within the counties. It is inadequate, also, because no provision is made for the recovery of interest and because, probably, the amount that at the time of filing the law actions would have been distributed by the county treasurers to the state, could not be recovered at all. The remedy provided by appeal under the state statute is uncertain, inadequate, and restricted to a state court.

We submit that the conclusions of the trial court and of the Circuit Court of Appeals were correct and that the decision of the Circuit Court should be affirmed.

SAMUEL H. CADY,
WILLIAM T. FARICY,
of Chicago, Illinois,
ROBERT R. ROSE,
of Casper, Wyoming,
Attorneys for Respondent.

LOWELL HASTINGS,
of Chicago, Illinois,
VINCENT MULVANEY,
of Casper, Wyoming,
Of Counsel.

APPENDIX.

CONSTITUTION OF THE STATE OF WYOMING.

ARTICLE I, SECTION 28:

Tax—Consent to. No tax shall be imposed without the consent of the people or their authorized representatives. All taxation shall be equal and uniform.

ARTICLE II, SECTION 1:

Departments. The powers of the government of this state are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

ARTICLE V, SECTION 1:

Judicial power—How vested. The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration and such courts as the legislature may, by general law, establish for incorporated cities or incorporated towns.

ARTICLE V, SECTION 10:

District courts—Jurisdiction of. The district court shall have original jurisdiction of all causes at law and in equity and in all criminal cases, of all matters of probate and insolvency and of such special cases and proceedings as are not otherwise provided for. The district court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed

by law. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, injunction and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective districts.

ARTICLE XV, SECTION 10:

Duties of board of equalization. The duties of the state board shall be as follows: To fix a valuation each year for the assessment of live stock and to notify the several county boards of equalization of the rate fixed at least ten (10) days before the day fixed for beginning assessments; to assess at their actual value the franchises, roadway, roadbed, rails and rolling stock of all other property used in the operation of all railroads and other common carriers, except machine shops, rolling mills and hotels in this state; such assessed valuation shall be apportioned to the counties in which said roads and common carriers are located, as a basis for taxation of such property; provided, that the assessment so made shall not apply to incorporated towns and cities. Said board shall also have power to equalize the valuation on all property in the several counties for the state revenue and such other duties as may be prescribed by law.

ARTICLE XV, SECTION 11:

Uniformity of assessment required. All property except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.

WYOMING REVISED STATUTES, 1931.

CHAPTER 115, ARTICLE 5, SECTION 512:

Appeals from board—Proceedings. Any person, persons, firm or corporation, who may feel aggrieved by the assessment or assessments by the board may take an appeal from the decision of the board to the district court of the county wherein the property or some part thereof is situated, where a trial *de novo* to the court shall be had.

The party or parties appealing shall, within sixty days after the decision of the board, file in the district court to which the appeal is taken a petition setting out the cause

of complaint, and a copy of the records of the board, all duly certified by the secretary of said board, and copies of said assessment or assessments.

The party appealing shall at the time of filing such appeal enter into an undertaking to be approved by the clerk or judge of said district court, and to be given to the state of Wyoming in such amount as the court or judge may fix, but in no case less than five hundred dollars ($500.00), and conditioned that the appellant shall prosecute the appeal without unnecessary delay, and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property, the assessment of which is in controversy.

The clerk of the court shall immediately upon filing of the appeal notify the secretary of the board under the seal of the court, and supply him with a copy of the petition.

It shall be the duty of the attorney general and the county attorney of the county to which the appeal is taken to represent the board in proceedings on the appeal.

All proceedings on appeal except as herein otherwise provided shall be under the provisions of the code of civil procedure, as in other civil cases (L. '31, c. 73, sec. 41).

CHAPTER 115, ARTICLE 5, SECTION 515:

Tax levy made on valuation fixed by board. The county commissioners of the respective counties, in which any portion of any railroad, telegraph or telephone line may be situated, shall levy the requisite taxes for the year, upon the valuation of the property of said railroad, telegraph or telephone company, returned to them as aforesaid at the time provided by law for levying the other taxes. (L. '79 c. 6 sec. 3; R. S. '87, sec. 3841; R. S. '99 sec. 1796; L. '01, c. 50, sec. 3; C. S. '10, sec. 2360; C. S. '20, sec. 2814).

CHAPTER 115, ARTICLE 5, SECTION 516:

Manner of collecting taxes. The taxes assessed and levied upon the property of any railroad, telegraph or telephone company, under the provisions of this chapter, shall be collected at the time and in the manner provided by law for the collection of other taxes. (L. '82, c. 91, sec. 1; R. S. '87, sec. 3843; R. S. '99, sec. 1797; L. '01, c. 50, sec. 4; C. S. '10, sec. 2361; C. S. '20, sec. 2815).

CHAPTER 115, ARTICLE 18, SECTION 1804:

Investigation of return. The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the state board of equalization shall, from all the information which it is able to obtain, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line. (L. '23, c. 57, sec. 4).

FILE COPY

NOV 2 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9.

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, AS TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, AS TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, AS TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION OF RESPONDENT FOR REHEARING AND CERTIFICATE OF COUNSEL.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Illinois,
ROBERT R. ROSE,
Of Casper, Wyoming,
Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	Page
Petition for Rehearing	1
I. Opinion Overlooks Real Vice of Mileage Factor as Used.	1
II. Opinion Recites Relation of Unlike Things to Support Board's Valuation	5
III. Reproduction Less Depreciation Was Not Actually Used by the Board and Should Not Have Been Used	6
IV. Trial Court's Action in Fixing Assessment Was Necessary Incident to Requiring Complaining Taxpayer to do Equity, and Does Not Constitute Exercise of Administrative Functions	9
V. The Reversal Makes No Provision for Correction of Mathematical Error Conceded By The Board	15
Conclusion and Prayer	16
Certificate of Counsel	17

Cases Cited.

Central Kentucky Co. v. Commission, 290 U. S. 264	13
French v. Barber Asphalt Paving Co., 181 U. S. 324	13
Louisville & Nashville Railroad Co. v. Greene, 244 U. S. 522	11, 14
Mobile & Ohio Railroad Co. v. Schnipper, 31 Fed. (2d) 587	10
Northern Pacific Railway Co. v. Adams County, 1 Fed. Sup. 163	10, 11
Norwood v. Baker, 172 U. S. 269	13
Raymond v. Chicago Traction Co., 207 U. S. 20	11, 14
State Railroad Tax Cases, 92 U. S. 575	9, 12, 15
Thompson v. Allen County, 115 U. S. 550	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9

THOMAS C. ROWLEY, as Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, as Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, as Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, as Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR REHEARING

Comes now the above named respondent, Chicago and North Western Railway Company, and presents this its petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

I.

OPINION OVERLOOKS REAL VICE OF MILEAGE FACTOR AS USED.

The opinion filed on the 5th day of November, 1934, overlooks the real vice of the "miles of road" factor as used

in this case. The opinion states that "where, as in this case, the evidence requires a finding that the railroad in one of the states reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that state, and the use of that basis as the sole measure for the apportionment must be condemned as arbitrary."

If it is erroneous as a sole factor, there is no merit in using it at full face value with other factors which are proper. By so doing the effect of the bad factor is merely diluted. Its vice is none the less present, and its effect is just as easily traceable. The thing to do with mileage to get its use upon some reasonable basis, if it is to be used at all, is *first* to take the mileage figure itself and equate it to something which takes into consideration the vast differences within and without the state, and *then,* to put it in, *as so equated,* with the other factors. Merely to throw it in with the full force of its admitted vice, and trust to that vice being sufficiently diluted by factors which are sound, is only a difference in degree from using it alone.

Equating the mileage factor *before* using would give effect to the differences in cost, value and other characteristics between a mile of line within the state and one without the state. Thus, it has been shown in this case that on the basis of the Interstate Commerce Commission's appraisal as of June 30, 1917, with the net additions (additions less retirements) through the last full year preceding the assessment here complained of, a mile of line in Wyoming cost only 52.77 per cent of a system mile (R. 73). 52.77 per cent of 3.29 per cent (the percentage of distance of main line track in Wyoming to the whole system) is 1.736 per cent (R. 73). If mileage is to be used as a fac-

tor, equating it so as to give recognition to this difference should be done *first*, and *then* the factor put in with the others. It will be noted that the percentage 1.736 arrives in the same general neighborhood as the factors of traffic units (1.58 per cent), composite of gross and net revenues (1.89 per cent), and use of rolling stock (1.65 per cent).

When a number of different tests produce about the same result, that is suggestive of their approximate accuracy. But, when a factor produces a percentage approximately twice as high (3.29 in the case of mileage) that very fact suggests that there is something radically wrong with it. The things that make it wrong have been fully shown in the record and are recognized by this court in the statement first quoted herein from the opinion. Why, then, use the wrong factor uncorrected, and thus partly destroy the effect of the accurate factors?

Petitioners stressed the fact that the assessment as finally made was about 63 per cent of the mileage proportion of agreed system value, and the court, on page 5 of the opinion, evidently regarded this as satisfying the requirement that differences in quality, cost, value and earning power of a mile within and without the state must be taken into consideration. But this overlooks the fact that 63 per cent is merely the average of the good and the bad,—with the accuracy of the good affected by the vice of the bad. A true recognition of the difference between a mile within and without the state would make the percentage about 44.75 instead of 63. This can be computed from plaintiff's Exhibit J-1 (R. 64, 65). A mile of Wyoming line produces 44.52 per cent of the revenue that is produced by an average system mile. It moves 43.02 per cent of the traffic units moved by an average system mile. It uses 46.73 per cent of the rolling stock used by an average system mile. On these bases a mile of Wyoming line is worth $19,858

(R. 65) or 44.75 per cent of $44,368 (R. 64), the latter figure being what the value of a mile of line would be if we were to divide the admitted system value by the number of miles. And if we relate cost of a mile of road in Wyoming to cost of an average system mile as heretofore shown, and leave out of consideration the fact that it produces less than an average system mile, even then we find that a mile of Wyoming line has a cost appraisal value of only 52.77 per cent of that of a system mile (R. 73). 52.77 per cent of $44,368 per mile is $23,413 per mile. The assessment as made was $28,313 per mile (R. 111). Both the trial court and the Circuit Court of Appeals recognized the fallacy of the figures as averaged by the board. Even the dissenting judge in the court below, who disagreed with his brethren of the majority on the proposition of jurisdiction, granted that "the method of valuation adopted was illegal and should be condemned" (R. 163).

If, in view of the vast differences which the evidence shows and the court has found exist between a mile of line in Wyoming and a system mile of respondent's railroad, it is arbitrary action to use the mileage factor alone, how is the vice removed merely by putting the bad factor in with three good ones? An omelet made of one bad egg would be a bad omelet. It would still be a bad omelet if made of three good eggs and one bad egg. What both lower courts did was to require an omelet made only of the three good eggs, with the bad one thrown out. If the present decision is allowed to stand, this court, in effect, will have approved the principle that the omelet must not be made of the bad egg alone but will be regarded as good if the bad egg is mixed with good ones.

II.

OPINION RECITES RELATION OF UNLIKE THINGS TO SUPPORT BOARD'S VALUATION.

On page 4 of the print of its opinion in this case, this court recites (with apparent approval—pages 6 and 7) the action of the board in relating Wyoming *cost* figures to system *value* (an average of stocks and bonds and capitalized income), and arrives at a percentage of 2.21. It is respectfully submitted that this is a comparison of unlike things. Cost of reproduction less depreciation in Wyoming should be related to cost of reproduction less depreciation for the system and that percentage used and applied to the agreed system value, if any percentage of that character is to be used. That percentage would be approximately 1.75, as the Interstate Commerce Commission appraisal for Wyoming, plus additions, less retirements, is 1.75 per cent of the same appraisal for the system, brought down to the date of the assessment complained of and in the same way (R. 73). Again it will be noted that the percentage 1.75 is within the neighborhood of the accepted factors.

It is respectfully submitted that the court has fallen into exactly the error that the board first did, in having related *cost figures in Wyoming* to system value figures *which are not cost figures at all*, and should not be. If an allocating percentage based on cost is to be used, it should be related to a system figure of like character. On such a basis, as already shown, the percentage would be 1.75,—not 2.21 as the board's calculation recited in this court's opinion would be. With this correction the percentage would more nearly support respondent's contention than that of petitioners.

Furthermore, these relations and comparisons were not

used by the board. They were "considered," according to the board, but evidently discarded, because the tabulation in the order shows the things that were actually used, and includes none of them.

III.

REPRODUCTION LESS DEPRECIATION WAS NOT ACTUALLY USED BY THE BOARD AND SHOULD NOT HAVE BEEN USED.

The board "considered" a number of things but it *actually used* only system value based on a composite of market value of stocks and bonds (less value of non-operating property) and capitalized net railway operating income, and Wyoming value allocated on the basis of traffic units, use of rolling stock, average of gross and net income, and miles of road. Its order so shows (R. 51). Things considered and ultimately discarded in fixing the valuation are not in the case.

In a tax case the ultimate idea is to fix the money equivalent of the property. It is not a question of theoretical values upon which the Railway Company is supposed to have the right to earn, but in fact never does earn, a fair return. It is a question of the actual money worth of the property, not in the light of what the maximum may be that the courts will permit it to earn if it can, but what its earnings actually are under efficient management. Reproduction less depreciation and an Interstate Commerce Commission appraisal made for this respondent in 1917 do not reflect at all the subsequent development of truck competition as we now know it,—the greatest menace to the continued existence of the present financial structures of the railroads of America that they have yet encountered. When the state sets up, at public expense, a system of modern, high-speed highways, competing with the rail transportation plants, for freight and passenger business within the state, no one

questions the right of the state to follow such a course. But when it does so, there certainly is nothing just or right about treating the plants of the railroads for tax purposes as if those parallel and competing publicly owned highways of transportation did not exist. Yet that is exactly what the state does if it uses reproduction less depreciation or I. C. C. value to build up a tax value. We are not speaking now of mere use of an allocating factor made up of the percentage that reproduction less depreciation in a given state bears to reproduction less depreciation for the system, or the percentage that the I. C. C. appraisal brought down to date in a given state bears to I. C. C. appraisal for the system brought down to the same date. We are speaking of the practice of taking the I. C. C. appraisal for the state or some other cost figure and finding the percentage that such a figure bears to a system value *made up without reference to cost or I. C. C. value and which nobody connected with this lawsuit has ever claimed should be made with reference to cost or I. C. C. value.* Fixing system value of a railroad operating in a number of states and then allocating to the respective states the portions of the whole value which should properly be treated as in the respective states, is a method approved in a number of cases cited to this court at pages 71 to 76 of our brief and is too well known to require further citation of authority, particularly as initially that is the way the board proceeded in the case at bar. If reproduction less depreciation or I. C. C. value were ever to have any place in fixing tax value of the railroad plant, naturally its place would come in fixing system value. This is so because the first part of the problem is to fix the value of the whole plant, and if reproduction less depreciation or I. C. C. value belongs in any state as part of the valuation process, it belongs in all states. But in this case it is agreed that the system value is $375,285,902, and it is likewise agreed that this system value is made up

on an average of market value of its stocks and bonds (less non-operating property locally taxed) and capitalized net railway operating income. It is clear beyond argument that neither reproduction less depreciation nor I. C. C. value had any place in the arrival at this agreed system value. The remaining part of the problem, then, is to find out what percentage of that system value belongs in Wyoming, and that part of the problem is to be solved by a relation or comparison of like things and thus secure the ultimate allocating figure to be used. What proportion does Wyoming property bear to the whole property? What proportion of the whole transportation plant does the use in Wyoming bear to the whole use? What percentage do Wyoming revenues bear to total revenues? All these things might, with propriety, be considered; because, having arrived at an agreed system value, the remaining problem is merely one of proportion. But to take reproduction less depreciation in Wyoming, after having eliminated it in arriving at system value, brings into the case at an entirely wrong place something previously ruled out, where, if ever, it would have had any place at all. We do not wish by this statement to leave the inference that it would be proper to use reproduction less depreciation or I. C. C. value to build up system value, in view of the problem being one of ascertaining the cash equivalent of the property. We merely say that whatever may be the arguments for or against using it in building up system value, the fact is that it was not so used at all in the present case, and that being so, there certainly is no adequate reason for bringing it in to build up the Wyoming portion of that system value except as the one thing may bear a percentage proportion to another *like* thing.

Since the board did not actually use reproduction less depreciation, but showed the exact mathematical formula which it did use, respondent felt justified in not arguing in

brief or at the bar the question of the propriety of using as part of the tax base calculations considered but not used, and, as we see it, discarded. It is earnestly submitted that having in mind what truck competition and other factors have done and are doing to destroy the original value of the railroad plant, no such far-reaching precedent approving the use of reproduction less depreciation in tax cases under present conditions should be adopted without full and complete argument of that very thing.

IV.

TRIAL COURT'S ACTION IN FIXING MAXIMUM ASSESSMENT WAS NECESSARY INCIDENT TO REQUIRING COMPLAINING TAXPAYER TO DO EQUITY, AND DOES NOT CONSTITUTE EXERCISE OF ADMINISTRATIVE FUNCTIONS.

The final paragraph of this court's opinion, unnecessary to the decision if it be true that respondent was not entitled to an injunction, overturns what has been the practice in the lower Federal Courts for many years in overassessment cases resting on constructive fraud or arbitrary overassessment.

The decision in *State Railroad Tax Cases*, 92 U. S. 575, did two things material to this point: (1) it laid down the principle that a court of equity will not interfere with an assessment which is merely erroneous (as distinguished from one which is arbitrary or fraudulent), and as one of the reasons for declining to interfere, pointed out that the court cannot perform the function of making the assessment which should be substituted for the one held erroneous, and (2) following the maxim "he who seeks equity must do equity," it prescribed the requirement that taxpayers who seek to enjoin assessments as fraudulent or arbitrary "must first pay what is conceded to be due, or what

can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted." The first of these two things, being stated as a reason why courts of equity cannot and do not interfere with mere errors of judgment of assessing bodies, has never been supposed to interfere with the power of a court of equity to do complete justice *in a case of fraud or arbitrary overassessment,* by enjoining that which clearly results from the fraud, and requiring payment of that which is due on the highest amount which can be assessed on any reasonable view of the evidence. Obedient to the direction given in the second of the above two things set forth in *State Railroad Tax Cases,* the lower Federal Courts for many years have been requiring payment of a portion of the taxes before granting a preliminary injunction in a case involving allegations of fraud or arbitrary overassessment. The complaining taxpayer is not always allowed to fix his own proportion to be paid, nor should he be. Preliminarily, if the amount tendered by the taxpayer as confessedly due seems to the court to be inadequate in any view, the court can fix, on affidavits or otherwise, the amount to be paid. Subsequently, the trial may develop, as in *Northern Pacific Railway Co.* v. *Adams County,* 1 Fed. Sup. 163, and *Mobile & Ohio Railroad Co.* v. *Schnipper,* 31 Fed. (2d) 587, that the board's assessment was too high on any view of the evidence, but that the payment made at the inception of the litigation was too low. Clearly the doing of equity then requires payment of the additional tax due and an injunction against the fraudulent or arbitrary excess. Any other procedure in a case of fraud, constructive or actual, or arbitrary overassessment, which is all we are talking about, would send the matter back to the offending board to make another assessment if it still has power to do so after the lapse of time during litigation, or to await the granting of power by the next legisla-

ture if by that time the board lacks the power or has become *functus officio,* as in *Northern Pacific Ry. Co.* v. *Adams County, supra.* Then future litigation on the new assessment is not at all unlikely, because a board which acts arbitrarily or is guilty of actual or constructive fraud, requiring the interference of a court of equity, is likely to make a new assessment still tainted with the same vices in a different form. The result would be endless litigation, and the holding up of the collection of needed public revenues or prevention of a timely determination as to just what amount can be depended upon from the source in question as its contribution to the public treasury.

The greater efficiency of an adjudication by which payment of the tax lawfully due is required and the excess is enjoined, is shown by several railway tax equalization cases, where this court has approved the practice by which the lower courts find the rate at which other property is assessed and require that complainant's property be not assessed at a greater percentage of true value. An injunction to restrain the discriminatory excess has long been the approved remedy, without sending the matter back to the board of equalization to do the fact finding. Such cases, for example, are *Raymond* v. *Chicago Traction Co.* 207 U. S. 20, where this court sustained equity jurisdiction of the Federal Court in a street railway tax case and at page 38, approved the action of the Circuit Court in having required the taxpayer to pay the amount "which the court found to be a fair and just amount due from the appellee" (taxpayer), and affirmed a judgment enjoining the excess; and *Louisville & Nashville Railroad Co.* v. *Greene,* 244 U. S. 522, where this court remanded a tax valuation controversy to the United States District Court to redetermine the valid portion of a tax, because this court found that the trial court had adopted a valuation fixed

on an erroneous principle by the state board, whereas, the evidence indicated that a lower valuation should have been fixed by the court. While the *Greene* case also involved equalization, it was more than an equalization case. At page 554 of the opinion, it is clear that, far from requiring the lower court to send back the case to the state board for it to make a new valuation, this court *ordered the trial court itself to make the proper valuation and either to open up the proofs, in its discretion, or proceed to base its judgment upon such proofs as already were in the record.* The procedure thus approved by this court in the *Greene* case and followed by many lower Federal courts is not inconsistent with what was said in *State Railroad Tax Cases, supra,* when it is realized that in that case this court was pointing out *what it could not do in a mere case of errors requiring a reassessment.* The court was not speaking of constructive fraud or arbitrary overassessment when it made the pronouncement in question in *State Railroad Tax Cases, supra.* Therefore, we submit, the case does not support the broad statement now made by this court in the last paragraph of its opinion in the case at bar.

The other cases cited by this court in the final paragraph of its opinion likewise are not in point. *Thompson* v. *Allen County,* 115 U. S. 550, was a case in which a bondholder who had obtained a judgment against the county on some coupons asked the Federal Court to take over bodily the tax levying and collecting functions of the county long enough to compel a number of named taxpayers to respond to plaintiff's demand. Previously, by court assistance, the plaintiff had secured a judgment, had levied execution which was returned unsatisfied, and had procured through mandamus a levy to pay his judgment. He asked the court to appoint a receiver for the county, to

collect the taxes and turn them over to him. This court held that the Federal Courts could not grant the relief requested, as to do so would amount to taking over the legislative and executive branches of the county government to the extent indicated. This case is a long way from a mere injunction against that part of a tax produced by fraud, separable from the part validly owing.

Central Kentucky Co. v. *Commission,* 290 U. S. 264, was a rate case, wherein a district court had denied relief to the utility because of its refusal to assent to a rate fixed by the court. This court held such a condition an improper exercise of the power of the court and at page 272 of the opinion said:

> "Such a condition, too, is different from the requirement that a plaintiff shall pay a tax, the amount of which is known and conceded to be due, as a condition of enjoining an excessive tax."

Norwood v. *Baker,* 172 U. S. 269, was a special assessment case, not a tax case, and at pages 292 and 293 this court quotes with approval from a text-writer setting forth the distinction which exists between the obligation to pay the part of a tax which is legally due before seeking an injunction as to the remainder, and the situation in respect of a special assessment, where, as in the case then under discussion, the entire assessment was illegal and no part of the tax was payable until a valid assessment was made.

French v. *Barber Asphalt Paving Co.* 181 U. S. 324, was a case to enforce the lien of a special assessment, and this court affirmed a decree enforcing the lien. It does not concern the question at issue here, and only incidentally refers to *Norwood* v. *Baker,* and this in a way not inconsistent with the contention we are making here.

It is submitted that a re-examination of these cases and

a comparison with *Raymond* v. *Chicago Traction Co.* 207 U. S. 20, and *Louisville & Nashville Railroad Co.* v. *Greene,* 244 U. S. 522, and especially with what was directed to be done in the *Greene* case at page 554, will disclose that the true distinction is (1) that in a tax case where the allegation is one of fraud (either actual or constructive) or arbitrary overassessment, or failure to give such equalization as constitutes equal protection of the laws, a court of equity may require payment of that which is due on the highest assessment that in any reasonable view of the evidence can be sustained, and restrain collection of the balance, without sending the case back to the offending board; (2) that in a tax case of mere error, a court of equity will not interfere because of its inability to exercise what is the legislative or administrative function; (3) that in a case involving a special assessment wholly illegal, the court will remand to the assessing authority the task of performing the legislative or administrative function involved. This case comes within the first of these classes.

If, as this court has said, respondent has no case, then such a serious thing as upsetting the existing practice should not be done when the question is not necessary to the decision, and therefore may not have had that mature and complete consideration which this court gives to questions that are essential to the decision. If respondent has no case for an injunction, that ends the litigation (except for correction of the admitted mathematical error to which reference will be made herein under heading V), and it is fruitless to say what the court should have done if respondent had had a case.

It is earnestly submitted, therefore, that if this court adheres to its view that respondent was not entitled to an injunction, the final paragraph of the opinion should be eliminated in any event and the question reserved for decision if and when it is necessarily presented.

V.

THE REVERSAL MAKES NO PROVISION FOR CORRECTION OF MATHEMATICAL ERROR CONCEDED BY THE BOARD.

As a footnote on page 5 of its opinion, this court says:

> "The court also corrected an admitted error of the board, by substituting 1.79% for 1.89%, average between gross and net operating revenues."

We assume that since all parties conceded this error, the form of the mandate, if there must be a reversal, should, in any event, allow for correction of this manifest and admitted error. The decision as it now stands renders it very doubtful whether the lower court can do even that. If this court is unimpressed with what has been presented in this petition, at least it should amend its direction for a straight reversal of the decree to such an extent as will not foreclose the respondent from having the court (or perhaps the board) correct an error which everyone admits occurred. If our computations are correct, this error of one-tenth of 1 per cent, corrected through the table which the board made up as set forth on page 4 of the decision, would reduce the valuation $84,438, as the ultimate percentage becomes 2.0775 instead of 2.10, or a difference of .0225 per cent. While such an amount is a very small crumb of satisfaction to a litigant which feels it has been arbitrarily overassessed by over a million and a half of dollars, respondent should not be foreclosed from a correction of a mathematical error which everyone seems to concede occurred (R. 36, 124, 127, 155). In such a situation, in *State Railroad Tax Cases,* 92 U. S. 575, at 618, the losing railroads were protected by the form of this court's reversal.

Conclusion and Prayer.

The court will recall that the major portions of the briefs and of the oral argument were taken up with serious questions of jurisdiction, which were thought to be the major consideration in the case. Those questions are left undecided by this opinion. The things upon which there was very little opportunity for oral argument, such as the propriety of using reproduction less depreciation or other cost figures under present conditions, and which the board did not actually use and which therefore were thought to be out of this case, are damaging things by way of precedent which ought not to be passed upon except deliberately and after full oral argument. The impropriety of relating Wyoming cost figures to system value figures having no relation to cost and then using the resulting percentage as an allocating factor, is something which, we believe, this court would not approve upon more complete consideration.

The final paragraph of the opinion, unnecessary to a decision if it be true that respondent was not entitled to an injunction, is especially disturbing by way of precedent, and, we believe, is a departure from recognized practice in this class of cases, built up in reliance on what is said in other decisions of this court.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals be, upon further consideration, affirmed.

Respectfully submitted,

Samuel H. Cady,
William T. Faricy,
400 West Madison Street,
Chicago, Illinois.

Robert R. Rose,
Casper, Wyoming,
Counsel for Respondent.

Certificate of Counsel.

I, William T. Faricy, of counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

William T. Faricy,
Of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 9.—October Term, 1934.

Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming, et al., Petitioners, *vs.* Chicago and Northwestern Railway Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 5, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought in the district court for Wyoming by the company against the treasurers of four counties to enjoin collection of a part of the taxes for 1931 levied upon its railroad property therein. The laws of that State required all taxable property to be assessed on the basis of its actual value. See State Constitution, Art. XV, § 11. Wyoming Compiled Statutes, 1931, §§ 115-119, 115-511, 115-1804. The complaint rests upon the claim that for a number of years, including the one here involved, the State acting through its board of equalization and other taxing authorities systematically and intentionally discriminated against respondent's railroad and in favor of all other property, in violation of the equal protection clause of the Fourteenth Amendment, in that it regularly taxed the railroad at about 133⅓% while taxing all other property at about 60% of actual value. Respondent tendered and paid to the treasurer of each county the amount it claimed would have been levied against it if all taxable property had been assessed upon the same basis of valuation. The total claimed by the four counties was $168,606.12; respondent paid $101,163.67, leaving in controversy $67,442.45.

Petitioners' answer denied discrimination. There was a trial at which much evidence was introduced. The district court upon specific findings of fact concluded that respondent's railroad property in Wyoming had been substantially and arbitrarily overvalued. It found that, with exceptions that are here immaterial, all other property had been assessed at its actual value. It en-

tered a decree requiring respondent to pay additional taxes amounting in all to $33,519.46 and enjoining collection of any part of the balance.

Petitioners seek reversal upon the ground that respondent failed to exhaust an administrative remedy open to it by appeal from the determination of the state board of equalization to the district court under § 115-512, Wyoming Compiled Statutes, 1931. They also maintain that under § 115-311 respondent had an adequate remedy at law and therefore was not entitled to relief in equity. These contentions depend upon serious questions of Wyoming law which have not been decided by its highest court. This court is reluctant, in advance of decision thereon by the state courts of last resort, to construe state statutes of doubtful meaning or to decide other questions of state law as to which there may be substantial controversy.

In this case it is not necessary for, upon an analysis of the grounds of the decision below, it is clear that respondent was not entitled to an injunction. Respondent does not challenge the finding that other property was assessed at actual value, and so there remains only the claim that its railroad was intentionally and arbitrarily overvalued by about 33⅓%.

The company had 278.35 miles of main line track in Wyoming and that constituted 3.29% of the main line track included in its system extending into nine States. Neither it nor the board dealt with that in Wyoming as a separate line; both appraised it as a part of the system. They took the value of the whole, attributed to Wyoming a portion and divided it among the four counties. The only matter in controversy is the amount to be assigned to that State.

To ascertain system value, respondent made calculations based on a five year period ending with 1930. It found the average market value of its stocks and bonds, deducted non-operating property locally taxed, added the remainder ($385,800,085) to an amount produced by capitalizing at 6% average net operating income ($364,771,720). The sum divided by two produced $375,285,902 which the board accepted for the purposes of its calculation, though one of its members testified "there are certain flaws in it".

To ascertain the value to be taxed in Wyoming respondent found for each year and also the average for the five-year period the per-

centages that Wyoming traffic units (ton miles and passenger miles) bore to the system total, the corresponding relation of use of rolling stock (car miles and engine miles) and of gross operating revenues, and by the calculations printed in the margin,[1] arrived at $5,849,570.

In pursuance of § 115-1803, respondent filed a return showing "grand total valuation $8,281,950". It attached a statement which includes the following:

"The valuations shown in this return are based upon the estimated cost of reproduction new of the physical properties . . . less depreciation, and without further reference to the market value of such properties or . . . of the stocks and bonds . . . or the present earnings . . . or the present or future earning capacity or possibilities of such properties. It is claimed that the valuations stated in this return do not represent the fair

	[1]Year	Value of entire line as represented by market values of stocks and bonds	Assigned to State of Wyoming on basis of			
			Traffic units	Operating revenues	Use of rolling stock	Average of 3 bases
		(1)	(2)	(3)	(4)	(5)
1	1926	$ 342,767,737	$ 5,827,052	$ 5,038,686	$ 5,929,882	$ 5,598,540
2	1927	398,490,108	7,212,671	6,057,050	7,372,067	6,880,596
3	1928	397,772,006	6,085,912	5,847,248	6,284,798	6,072,653
4	1929	398,555,050	5,699,337	5,579,771	6,018,181	5,765,763
5	1930	391,415,526	5,558,100	5,714,667	6,027,799	5,766,855
6	Aggregate ..	$1,929,000,427	$30,383,072	$28,237,422	$31,632,727	$30,084,407
7	Aver. 5 Yrs...	$ 385,800,085	$ 6,076,614	$ 5,647,484	$ 6,326,545	$ 6,016,881

	Year	Value of entire line as represented by income capitalized at 6%	Assigned to State of Wyoming on basis of			
			Traffic units	Operating revenues	Use of rolling stock	Average of 3 bases
8	1926	$ 371,585,653	$ 6,316,956	$ 5,462,309	$ 6,428,432	$ 6,069,232
9	1927	337,628,225	6,111,071	5,131,949	6,246,122	5,829,714
10	1928	387,094,715	5,922,549	5,690,293	6,116,096	5,009,646
11	1929	437,002,491	6,249,136	6,118,035	6,598,738	6,321,970
12	1930	290,547,517	4,125,775	4,241,994	4,474,432	4,280,734
13	Aggregate ..	$1,823,858,601	$28,725,487	$26,644,580	$29,863,820	$28,411,296
14	Aver. 5 Yrs...	$ 364,771,720	$ 5,745,097	$ 5,328,916	$ 5,972,764	$ 5,682,259

	Ratio used	Entire line	State of Wyoming		
15	1926	100.00%	1.70%	1.47%	1.73%
16	1927	100.00%	1.81%	1.52%	1.85%
17	1928	100.00%	1.53%	1.47%	1.58%
18	1929	100.00%	1.43%	1.40%	1.51%
19	1930	100.00%	1.42%	1.46%	1.54%

		Miles of road	Per mile of road	
20	Average for 1930 only.....	278.35	$18,085	$ 5,023,795
21	Average for Five Years.....	278.35	$21,015	$ 5,849,570

cash value of the property for purposes of taxation. The value as to the system . . . and as to the part in . . . Wyoming is clearly and fairly set [forth] by the figures contained in the exhibits attached to this return . . . and which . . . show that the total true value . . . in . . . Wyoming, or properly allocated to the State, does not exceed $5,849,570".

After receiving the return, the board found cost of reproduction new less depreciation of respondent's railroad properties in Wyoming on the basis of an appraisal by the Interstate Commerce Commission as of 1917 plus later betterments to be $11,724,126, depreciated that at the annual rate of 2.5% for 13 years and so produced $8,436,076; ascertained the Wyoming 1930 net operating income to be 2.23% of the total for that year, applied that ratio to system value ($375,285,902) and produced $8,368,876. Each of the two last mentioned indications of value is substantially more than the reproduction cost less depreciation given by respondent in its return. The board, in order to equalize the valuation of respondent's property with other Wyoming railroad properties, made the assessment $7,989,587 which is 2.13% of system value. This is considerably less than the cost figures stated in the return.

After notice of the assessment there was a hearing at which respondent presented the theory and bases of its appraisal. It appears that upon further consideration the board took into account the facts that for the five-year period Wyoming net revenue was 2.114% of the system total; respondent's estimated cost of reproduction less depreciation of the Wyoming property was 2.21% of the system value, and that one-half the sum of these percentages is 2.162%. Of the percentages used by the respondent, the board accepted those based on traffic units and use of rolling stock, rejected that based on gross operating revenues, substituted for it one-half of the sum of the gross operating revenue percentage plus the net operating revenue percentage, introduced the percentage that Wyoming mileage is of system mileage and divided the total by four, producing 2.1%. Its ascertainment of the ratio used follows:

Traffic Units	1.58%
Use of Rolling Stock	1.65%
Average between gross and net operating revenues	1.89%
Main track mileage	3.29%
Divided by 4	8.41%
Percentage to be allocated to Wyoming	2.10%

The board applied this percentage to system value and so established the final assessment, $7,881,003.94, which is less than the earlier one by more than $100,000. This is about 63% of the mileage proportion of agreed system value.

The district court rejected as without support respondent's use of the gross operating revenue percentage. It found that the board used the mileage basis, 3.29%, without taking into account the fact that respondent's property in Wyoming, measured on a mileage basis, was greatly less in quantity, quality, cost and value than the portion of its operating system located outside that State. It was upon that ground that the court concluded that respondent's property "was substantially and arbitrarily overassessed". And it condemned as unreasonable and arbitrary the board's use of the mileage percentage. Then proceeding to correct what it held to be the error of the board, the court found one-third of the sum of the percentages based on Wyoming and system traffic units, rolling stock and the average between gross and net operating revenue to be 1.673%.[2] It applied that ratio to the admitted system value and so produced $6,278,534.14—being a reduction of the assessment by $1,602,468.90—directed respondent to pay taxes on that basis and enjoined petitioners from collecting more.

The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property. *Boom Co.* v. *Patterson*, 98 U. S. 403, 407 *et seq.* *Cleveland &c. Railway Co.* v. *Backus*, 154 U. S. 439, 445. *Adams Express Company* v. *Ohio*, 166 U. S. 185, 220. *Brooklyn City R. R. Co.* v. *New York*, 199 U. S. 48, 52. *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202-203. *Minnesota Rate Cases*, 230 U. S. 352, 434, 454. *Branson* v. *Bush*, 251 U. S. 182, 185-188. *S. W. Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 287. *United States* v. *New River Collieries*, 262 U. S. 341. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123-126. *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S.

[2]The court also corrected an admitted error of the board, by substituting 1.79% for 1.89%, average between gross and net operating revenues.

146, 155 *et seq.* *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 410, 414, *Olson* v. *United States*, 292 U. S. 246, 255 *et seq.* The apportionment of system value between Wyoming and the rest of the system involves the finding of the value of the portion of the railroad that is located in that State. The problem is quite like the ascertainment of the value of the whole. The determination is to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property.

Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary. *Fargo* v. *Hart*, 193 U. S. 490, 500. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282-283. *Wallace* v. *Hines*, 253 U. S. 66, 69. Cf. *Chicago & N. W. Ry. Co.* v. *Eveland*, 13 F. (2d) 442, 447. In arriving at the relation between value in Wyoming and system value, the State board did not confine its calculation to relative mileage. That percentage combined with the other ratios used in the calculation produced 2.1% finally adopted. Nor did it limit its consideration of the problem to the elements employed to make that computation. Among other things it took into account the cost of reproduction less depreciation of the Wyoming property; the relations between that figure and the agreed system value, and between operating net revenues derived from the Wyoming property and those earned by the system for the five-year period and for 1930. Each of these is an indication that the value of the Wyoming property is substantially more than the assessment in question.

The record shows that the board considered respondent's calculation. Refusal to accept that formula as the measure was not arbitrary. Respondent's use of the average of three ratios indicates that it realized that there were substantial objections against each as the sole test. It is obvious, even when results of operation over a substantial period are considered, that as a matter of fact the value of respondent's Wyoming line does not rise and fall with decline and increase of ton miles, passenger miles, car miles, engine miles or gross revenue in any other State or upon the bal-

ance of the system. Moreover, by the use of its formula respondent failed to take into account facts that justly may be considered to have significant bearing upon the relation between Wyoming value and system value. Such, for example, are the length of line to be assessed and the net operating revenues. The other factors that are shown to have been considered by the board give substantial support to the percentage finally adopted as the basis of the assessment.

There is nothing in this record to suggest any lack of good faith on the part of the board. Overvaluation resulting from error of judgment will not support a claim of discrimination. There must be something that amounts to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity. *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350. *Sioux City Bridge* v. *Dakota County,* 260 U. S. 441. *Chicago G. W. Ry.* v. *Kendall,* 266 U. S. 94. *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245. *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 28. There was no discrimination against respondent by undervaluation of the property of others. We find no substantial support in the findings of the district court or in the evidence for the conclusion that the use that the state board made of relative mileage to ascertain the value of respondent's Wyoming railroad property was arbitrary or unreasonable or indeed erroneous, or for its conclusion that the property was substantially or arbitrarily overvalued. Respondent was not entitled to an injunction.

The trial court was not called upon, and it was no part of the judicial function, to determine the base or amount of the tax that in its view might legally be exacted as a result of the assessment in question. *State Railroad Tax Cases,* 92 U. S. 575, 614-615. *Thompson* v. *Allen County,* 115 U. S. 550. Cf. *Central Kentucky Co. v. Comm'n,* 290 U. S. 264, 271, *et seq.* If that assessment were illegal, the State, notwithstanding any adjudication against its validity as repugnant to the Federal Constitution, should have been left free again to value the property. *Norwood* v. *Baker,* 172 U. S. 269, 293. And see *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 344.

Decree reversed.